Central Law Journal.

ST. LOUIS, MO., JAN. 23, 1903.

HABEAS CORPUS AS A PROPER REMEDY TO SECURE THE RELEASE OF A PRISONER ABOUT TO BE EXTRADITED BY THE GOVERNOR TO ANOTHER STATE AS A FUGITIVE FROM JUSTICE WHO HAS NEVER BEEN IN THE DEMANDING STATE.

Questions relating to interstate extradition of fugitives from justice under the federal constitution have arisen quite often and have been settled in most cases very unsatisfactorily. In previous issues of the CENTRAL LAW JOURNAL we have discussed the serious complications and open ruptures between the executives of our sister commonwealths where one arbitrarily refuses to extradite a fugitive from justice demanded by the other. In these discussions we have shown that in every such case the governor who thus refuses a requisition violates his oath to support the constitution of the United States, that instrument giving him absolutely no discretion in such matters, beyond requiring that the statutory provisions relating thereto be complied with. 53 Cent. L. J. 421; 54 Cent. L. J. 1; 55 Cent. L. J. 341. In the recent case of People v. Hyatt (N. Y.), 64 N. E. Rep. 825, another serious question arises—whether the action of the governor of a state in granting a requisition can be reversed on *habeas corpus* proceedings on the ground that he was not in the demanding state when the crime was committed, and therefore not a fugitive from justice.

The first question that naturally arises, is—what is a "fugitive from justice" within the meaning of the constitutional and statutory provisions in regard to the extradition of criminals? On this general point, the New York Court of Appeals said: "What constitutes a fugitive from justice has been the subject of much discussion by eminent text-writers, and of many decisions by the courts and by the governors of the several states. There seems to be substantial unanimity in all the authorities on one proposition,—that, to be a fugitive from justice, a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime." There can be no dispute that that is the law at the present time at least as far as the preponderance of authority goes. *Ex parte* Reggel, 114 U. S. 642; *In re* Voorhees, 32 N. J. Law, 141; Wilcox v. Nolze, 34 Ohio St. 520; Hartman v. Aveline, 63 Ind. 344; Jones v. Leonard, 50 Iowa, 106; *In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63. There is, therefore, as far as the law of extradition is concerned, no such thing as "constructive" presence, the one authority that had the temerity to announce such a doctrine, being frequently criticised. *In re* Cook, 49 Fed. Rep. 833, reported in the supreme court as Cook v. Hart, 146 U. S. 187. In the opinion there delivered by the district judge, it is said: "One may commit an offense against a state upon whose soil he has never set foot." The answer of the authorities to that statement is that that fact may be incontrovertible but that it does not determine the question whether the offender is a fugitive from justice. The question of constructive presence arises more frequently, of course, in cases such as obtaining money or goods by false pretenses. But under the rule announced, the law must be vindicated, if at all, by the state where the fraudulent schemer resides, and not by the state where the offense was in reality committed. While we are satisfied that this is the law, we do not feel satisfied that it meets the intention of the framers of the constitution in regard to the provision for the extradition of criminals. Certainly, if a person can be punished by a state, into which he has sent letters or other innocent agents for the purpose of defrauding or libelling any of the citizens if it can secure possession of his person within its jurisdiction, why has it not the right to demand him as a fugitive from the justice of its laws which he has so openly and defiantly outraged. On this point, we are in sympathy with the opinion expressed by Haight, J., dissenting in the New York case. He said: "The prevalence of crimes committed in one state by persons actually in another state, through innocent agents employed by them, such as the forwarding of forged drafts, checks, and other instruments through the mails, express agencies, or otherwise, for the purpose of procuring money or other property thereon, makes it desirable that the question should be determined as to whether, under the constitution and statutes of the United States, a person

found in one state can be surrendered up, to be taken to another state for trial, for a crime committed therein, through some innocent agency of his, when he was only constructively present in the person of his agent. That question, however, ought to be determined by the Supreme Court of the United States."

As to whether the supreme court of a state has the right to review the action of the governor in his decision to extradite a prisoner except as to the question of identity there is more uncertainty among the authorities. In the case of Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, we have a case in many respects very similar to the one under consideration. In that case the relator had been indicted in the state of New York for grand larceny. A requisition was made by the governor for his extradition from the state of Georgia. The governor of that state issued his warrant, upon which he was arrested and held in custody. *Habeas corpus* was then issued by the district court of the southern district of Georgia. The accused made an affidavit denying his guilt, and also denying that he was in the state of New York on the day laid in the indictment as the date of the offense; but he did not deny that he was in the state at about that date. Mr. Justice Matthews, in delivering the opinion of the court, says, with reference to the claim that the relator was not a fugitive from justice, "that it is a question of fact which the governor of the state upon whom the demand is made must decide upon such evidence as he may deem satisfactory. * * * The determination of the fact by the executive of the state in issuing his warrant of arrest upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." The judgment of the circuit court, remanding the prisoner to the custody of the agent of the state of New York, was affirmed. It will be observed that in that case the relater showed that he was not in the state at the date laid in the indictment; but this did not overcome the presumption of fact found by the governor that he was a fugitive from justice."

In the New York case, however, to which we have just called attention, it was held that it had a perfect right to review the action of the governor in extraditing a prisoner under a proceeding for the latter's release on *habeas corpus*. The court said in criticising the case of Roberts v. Reilly, *supra:* "That decision by its very terms, implies that the action of the governor is only presumptively regular and can be reviewed by the courts. Surely it cannot be claimed that such action is conclusive upon personal right, and may not be inquired of by judicial tribunals. Surely it cannot be that the right to personal liberty hangs upon so slender a thread as the arbitrary will of the authorities of the demanding and surrendering states. 'No person shall be deprived of life, liberty or property without due process of law.' That is the fundamental law of the land, coming to us from Magna Charta. It is not due process of law which condemns without hearing, which convicts without trial. * * * It is essential to compliance with such executive demand that the person whose surrender is demanded should be adjudged a fugitive from the justice of the demanding state. The decision of the executive is not conclusive of that fact." To same effect: Jones v. Leonard, 50 Iowa, 106; Hartman v. Aveline, 63 Ind. 344; *In re* Mohr, 73 Ala. 503.

NOTES OF IMPORTANT DECISIONS.

THE DOCTRINE OF VESTED INTEREST AS AFFECTING THE QUESTION OF SURVIVORSHIP WHERE THE INSURED AND BENEFICIARY IN A BENEFIT CERTIFICATE PERISH IN A COMMON DISASTER.—We have already extensively considered the subject of this note. But of recent years there has been so much litigation on this question as to make every recent authority valuable. We desire, therefore, to call attention to the recent case of Males v. Sovereign Camp Woodmen of the World, 70 S. W. Rep. 108, in which the Court of Civil Appeals of Texas held that where a benefit certificate, issued by a beneficial association, payable to the wife of the insured, provides that in case of the death of the designated beneficiary before that of the insured, the benefit, in the absence of a new designation, shall be paid to the insured's relatives in a certain order, the relatives are entitled to the benefit, as against the representatives of the beneficiary, where the beneficiary and the insured perish in the same disaster, and there is no proof that the beneficiary was the survivor, her representatives having the burden of proving that she survived the insured.

It will be observed that this case involved a beneficiary under a benefit certificate, and not in

a regular life policy. It is universally recognized that in such cases the beneficiary does not acquire a vested interest in the fund represented by the certificate such as attaches to the beneficiary's right under a regular life policy, and that therefore the representatives of the beneficiary in such cases must prove the latter's survivorship before they can take anything under the certificate, in cases where both the insured and beneficiary perish in a common disaster. Supreme Council Royal Arcanum v. Kacer, (Mo. 1902), 69 S. W. Rep. 671. This latter case cited from Missouri shows, however, the distinction to be made between beneficiaries under benefit certificates, and regular life policies. The facts in that case gave rise to two suits involving the same question. It appeared that Mr. Yocum, the insured, died, leaving a regular life policy for ten thousand dollars in the United States Casualty Company, and a benefit certificate for three thousand dollars in the Royal Arcanum. Both the certificate and policy read that Mr. Yocum's daughter, Florence, should take "if surviving." There was an interpleader suit brought both by the casualty company and the Royal Arcanum, requiring the heirs of Mr. Yocum and the heirs of Florence Yocum to contend for the money due under the policy and certificate respectively. On the trial, the heirs of Florence Yocum won in the case of the regular life policy, which on appeal to the Supreme Court of Missouri was affirmed on the express ground that by the issuance of the policy Florence Yocum acquired a vested interest, which, before displacement devolved the burden of proof upon the legal representatives of Mr. Yocum to show that the daughter, Florence, predeceased him. Casualty Co. v. Kacer, (Mo. 1902), 69 S. W. Rep. 370, 55 Cent. L. J. 127. In the other case, however the heirs of Mr. Yocum triumphed. In affirming this case, the Missouri Court of Appeals (to which this case went because of the amount involved) held that in a contest over the proceeds of a benefit certificate where beneficiary and insured perish in a common disaster the burden of proving survivorship rests upon the legal representatives of the beneficiary, on the ground that persons named as recipients of the bounty provided for in certificates of insurance in fraternal orders are commonly subject to displacement at the pleasure of the insuring members and therefore neither acquire nor hold a vested interest during the life of the insured. The court of appeals in this case distinctly refer to the case of Casualty Co. v. Kacer, *supra*, distinguishing the two cases upon the ground that in the supreme court case the interest of Florence Yocum was a vested one, the policies of insurance in that case being in the ordinary form of life policies without reservation of right in the insured to change the beneficiary.

In the case of regular life policies, however, the law is not conclusively settled as to whether the fact that the beneficiary has a vested interest in the policy in any degree changes the burden of proof, especially in cases where it is provided that she shall not take unless she survives. For a full discussion of this particular phase of the question, see 53 Cent. L. J. 188; 55 Cent. L. J. 131.

EVIDENCE—WHEN THE SILENCE OF A PARTY CAN BE ADMITTED AS EVIDENCE AGAINST HIM.—It is a familiar saying that a man runs more danger in talking too much than by keeping silent. This rule, however, like all others, is not without its exceptions. When a man keeps silent when he ought to speak out, the law counts his silence as an admission against him. This rule again, on the other hand, is not to be applied indiscriminately and carelessly. Probably the best statement of the rule and its limitations is contained in the opinion of the court in the recent case of People v. Smith (N. Y.), 64 N. E. Rep. 814. In this case, a defendant charged with killing his wife was brought in to see her. He said nothing when as he took her hand she quickly drew it away and her countenance changed. As to whether this constituted an admission, the court said:

"The only possible ground upon which the silence of a party can be admitted as evidence against him is that it amounts to an acquiescence in a statement or act of another person. The rule admitting such evidence is to be applied with careful discrimination. Such evidence is most dangerous, and should be received with great caution, and not admitted unless of statements or acts which naturally call for contradiction, or unless it consists of some assertion with respect to his rights, in which, by silence, the party plainly acquiesces. To have that effect, his acquiescence must be exhibited by some act of voluntary demeanor or conduct. If the claimed acquiescence is in the conduct or language of another, it must plainly appear that such conduct or language was fully known and fully understood by the party before any inference can be drawn from his passiveness or silence. The circumstances must not only be such as to afford him an opportunity to act or speak, but such as would ordinarily and naturally call for some action or reply from persons similarly situated. If the condition be one of doubt as to whether a reply should have been made, the evidence should not be received. Declarations or acts made or performed in the presence of a party when received in evidence, are received, not as evidence in themselves, but in a proper case, and under proper circumstances and conditions, they may be admitted to ascertain what the party to be affected said or did; but he is not to be prejudiced by the statements or acts of another in his presence, although silent, unless the statements or acts are such as to call for some response or act upon his part. People v. Koerner, 154 N. Y. 355, 374, 48 N. E. Rep. 730; Lanergan v. People, 39 N. Y. 39; Kelley v. People, 55 N. Y. 565, 572, 14 Am. Rep. 342; People v. Willett, 92 N. Y. 29; Wright v. People, 1 N. Y. Cr. R. 462."

Further on in the opinion, speaking of the questions involved in this particular case, the court said: "Thus the question is presented whether, under the circumstances existing at each of the defendant's visits to the bedside of his wife, of which evidence of his silence was given, it can be properly held that he thereby acquiesced in any act or acts of the decedent which had any prohibitive bearing upon the issue. Thus we are led to inquire, in what can it be properly said that he acquiesced? Nothing was said to which any reply could have been made. Nor do we think there was any act of the decedent which, under the circumstances proved, demanded action or remark upon the part of the defendant, to avoid acquiescence therein. What should he have done? With no proof that the defendant observed these things, was he required to interrogate her as to her change of countenance, as to the reason why she withdrew her hand, why she did not speak to him or look at him, or why she turned her head, or be bound by the conjecture of a jury as to what impelled such acts upon her part, although, under the proof, they may have been wholly involuntary? We think not. She being at most only semiconscious, he was not required to, nor could he properly, speak of or criticise her conduct, even if it was as testified to and was observed by him. But there was no proof that he observed any peculiar action or conduct upon her part, or anything in the nature of an accusation by her. In view of the fact that she persistently declared him to be innocent, naturally he would not anticipate or observe an accusation in anything that she was proved to have done or omitted. It is also to be remembered that the defendant had been frequently enjoined by the physicians and nurses in attendance to maintain silence and not to disturb the decedent when in her presence; that the decedent, when approached by her physicians or nurses, and her wrist was touched, would not only make a convulsive movement of her hand, but would turn over on her left side, with her face to the opposite wall; that she was partially paralzyed, and, as a consequence, her speech was essentially impaired and difficult to understand; that her face was thereby distorted; and that the defendant was, upon each of the occasions when he visited her room, in the immediate custody of an officer, who controlled his coming and departure. In view of the fatal illness of his wife, and of the positive injunctions of silence by her physicians and nurses, his omission to speak in her presence certainly could not be properly regarded as an acquiescence by him in anything she was proved to have done or omitted. Moreover, he was at the time under arrest and in the custody of an officer, and might well have been silent without its being regarded as an acquiescence in any act proved to have been performed. Com. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; State v. Diskin, 44 Am. Rep. 449. We think the court erred in admitting much of this evidence, and also in permitting the witness Dabell to state her knowledge of the impulses of the decedent when she withdrew her hand, from her looks and from what she subsequently said, with no proof as to what that statement was."

RIGHTS AND REMEDIES OF PREFERRED SHAREHOLDERS.

§ 1. *Such Rights Involve Questions of Interpretation of the Contract.* — In examining the cases, in most instances the questions which have arisen with respect to the rights of preferential stockholders are *questions of interpretation* depending upon the terms of the particular constating instrument, — let us say the governing statute, the by-law, the vote of the stockholders at general meeting, the resolution of the directors, and the recitals in the certificate of preferential shares, —rather than upon the general principles of law.[1]

§ 2. *Preferred Stock Gives a Right to Interest Chargeable upon Profits.* — The view of some of the English courts that a preferred and guaranteed dividend authorized by an act of parliament is substantially *interest, chargeable exclusively* upon profits,[2] has been adopted in this country, and the conclusion thus expressed has been reached: "The guarantee of a dividend by a railway company is construed by the courts * * * to mean nothing more than a pledge of the funds

[1] Cases could be cumulated, depending upon the terms of such instruments rather than on general principles of law, but a detailed examination of them would be of little value. Such cases are: Totten v. Tison, 54 Ga. 139; Sullivan v. Portland, etc., R. Co., 4 Cliff. (U. S.), 212; Bailey v. Hannibal, etc., R. Co., 1 Dill. (U. S.), 174; Culver v. Reno Real Estate Co., 91 Pa. St. 367: Thompson v. Erie R. Co., 11 Abb. Pr. (N. Y.), 188, 42 How. Pr. (N. Y.), 68; St. John v. Erie R. Co., 10 Blatchf. (U. S.), 271; Belfast, etc., R. Co., v. Belfast, 77 Me. 445. Interpretation of the phrase "dividends accruing": Parks v. Automatic Bank Punch Co., 14 Daly (N. Y.), 424, 14 N. Y. St. Rep. 710. Interpretation of the phrase "interest dividends," payable "when able": Barnard v. Vermont, etc., R. Co., 7 Allen (Mass.), 512. Compare Cunningham v. Vermont, etc., R. Co., 12 Gray. (Mass.), 411. Rights of preferred shareholders as against schemes of arrangement under English Railway Act of 1867: *Re* Neath, etc., R. Co., (C. A.), (1892), 1 Ch. 349. A *by-law* providing for the payment of dividends on the preferred stock of a company establishes a contract between the company and its preferred stockholders: Belfast, etc., R. Co. v. Belfast, 77 Me. 445; Hazeltine v. Belfast, etc., Co., 79 Me. 411, 1 Am. St. Rep. 330.

[2] Henry v. Great Northern R. Co., 3 Jur. (N. S.), part 1, p. 1133, 1 De Gex & J. 606. See, also, Crawford v. Northeastern R. Co., 3 Jur. (N. S.), part 1, p. 1093; Matthews v. Great Northern R. Co., 5 Jur. (N. S.), part 1, p. 284.

legally applicable to the purpose of a dividend; that, in short, it is a *dividend*, and not a *debt*, which is thus preferred and guaranteed."[3]

§ 3. *Entitles the Holder to Dividends only in Case they are Earned.*—The ordinary species of preferred stock amounts merely to an engagement to *divide earnings* among the preferred stockholders in preference to those who are not preferred. If there are no earnings in a particular year, they get no dividend in that year. Whether there are earnings in a particular year, which can be divided among the preferred stockholders, is a matter for the directors to determine in the first instance, in the exercise of a sound and honest business discretion, and subject to the control of the courts in case their discretion is abused, as hereafter shown.[4] Such a claim makes the holder of the share-certificates a stockholder, and not a creditor.[5] When, therefore, no profits have been earned out of which a preferred dividend can be paid, the holder of preferred shares on which a dividend is guaranteed at a certain rate per annum "before any dividend shall be paid on other stock of said company," cannot maintain an action of *assumpsit* for the recovery of the annual dividend thus guaranteed.[6]

§ 4. *Right of Preferred Shareholders to Dividends not Absolute, but Subject to Just Discretion of Directors.* — The right of the holder of preferred shares is not an absolute right to a dividend, unless the contract so states; but it is a qualified right controlled by the sound discretion of the directors, subject to judicial superintendence, where there are profits which, considering the entire situation of the company, its public duties, if any, can be divided, and which ought to be divided.[7] A declaration of a dividend out of net profits, contrary to the judgment of the directors, is not required by the fact that the directors have guaranteed the payment of dividends upon preferred shares in accordance with a statute which permits a guaranty of such dividends, payable cumulatively out of net profits.[8]

§ 5. *What Are "Net Earnings" to be Appropriated in Dividends on Preferred Shares.* —This question has been answered thus by Sir George Jessel, M. R.: "That means this, that the preferred shareholders only take a dividend if there are profits of the year sufficient to pay their dividend. * * * They are co-adventurers for each particular year, and can only look to the profits of that year. If they are lost for that year, they are lost forever. Profits for the year mean the surplus receipts, after paying the expenses and restoring the capital to the position it was in on the first day of January of that year."[9] Similarly, the following definition by Mr. Justice Blatchford, has often been quoted: "Net earnings are, properly, the gross receipts, less the expense of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go towards dividends, which, in that way, are paid out of the net earnings.[10] Net earnings are what is left after

[3] Taft v. Hartford, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575.

[4] New York, etc., R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. Rep. 209.

[5] State v. Cherαw, etc., R. Co., 16 S. Car. 524.

[6] Taft v. Hartford, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575.

[7] New York, etc., R. Co. v. Nickals, 119 U. S. 296, 306; Feld v. Roanoke Investment Co., 123 Mo. 603, 27 S. W. Rep. 635; McLean v. Pittsburg Plate Glass Co., 159 Pa. St. 112, 33 W. N. C. (Pa.), 459, 24 Pitts. L. J. (N. S.), 337, 28 Atl. Rep. 211; Field v. Lamson, etc., Man. Co., 162 Mass. 388, 38 N. E. Rep. 1126, 27 L. R. A. 136.

[8] Field v. Lamson, etc., Man. Co., 162 Mass. 388, 38 N. E. Rep. 1126, 27 L. R. A. 136. It has been held, that holders of preferred stock in a corporation, evidenced by certificates providing that such holders are entitled to dividends out of the net earnings of each year when declared by the board of directors, to the extent of a certain percentage, before payment of dividends to the holders of common stock, but that such dividends are not cumulative, are not entitled to any dividends when the board of directors determine that it is for the interest of the corporation to expend the profits in the enlargement, extension and increase of its works and business, instead of in declaring dividends: McLean v. Pittsburg Plate Glass Co., 159 Pa. St. 112, 33 W. N. C. (Pa.), 459, 24 Pitts. L. J. (N. S.), 337, 28 Atl. Rep. 211. Where the shareholder in another corporation has exchanged his shares for preferred shares in the particular corporation, and the preferred shares call for the payment of interest semi-annually, the failure to pay such interest is not a substantial breach of the contract entitling the holder of the shares to a rescission of the exchange: Feld v. Roanoke Investment Co., 123 Mo. 603, 27 S. W. Rep. 635.

[9] Dent v. London Tramway Co., L. R. 16 Ch. 344. To a similar effect, see Mor. Corp. (2d Ed.) § 450.

[10] St. John v. Erie R. Co., 10 Blatchf. (U. S.), 271, 279, aff'd 22 Wall. 136. In Elkins v. Camden, etc., R. Co., 36 N. J. Eq. 233, 239, it is said in discussing this question that "rights are to be governed and regu-

paying current expenses and interest on debts and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay."[11]

§ 6. *Preferential Dividends do not Cumulate.* — It is to be inferred from the preceding paragraph, that the right of preferred shareholders to dividends is ordinarily confined to the profits in each particular year; that such dividends do not cumulate; so that if they cannot be paid in a particular year, they are not chargeable on the profits of the next year, and payable out of such profits to the prejudice of the common shareholders.[12]

§ 7. *Earnings not Withheld from Stockholders in Order to Cumulate a Fund for the Liquidation of Debts Secured on the Corporate Property and Maturing in the Future.*— If a corporation has a funded interest-bearing debt which represents so much borrowed capital, and is able to maintain its plant in a suitable condition for the conduct of its business, and to pay the interest on such funded debt, the directors will ordinarily not be justified in allowing profits to accumulate in a reserve fund for the purpose of liquidating the funded debt when it matures, to the exclusion of the right of preferred stockholders to their dividends; provided that the property upon which its funded debt is secured is amply sufficient to enable it to renew the same at maturity, as is generally done. The contrary rule, it has been pointed out, would in the case of many, if not most of the American railways, result in withholding the dividends from preferred stockholders indefinitely. The hardship is especially apparent when the rule is recollected that, where the dividends for a particular year are passed because there are no net earnings to divide, the right to that dividend is lost forever.[13]

§8. *Doctrine That a Guaranty of a Stated Dividend Creates an Absolute Debt.* — There has been a difference of judicial opinion on the question whether a guaranty of a dividend by a corporation is tantamount to an agreement to pay annual interest on the shares at a stated sum, and hence creates an absolute debt, or whether it is tantamount to an agreement to pay a stated dividend on the shares in preference to any dividend on the common shares, in case there shall be profits to divide. It should seem that there ought not to have been any difference of judicial opinion on such a question, since to construe such an engagement merely as an agreement to make a dividend out of profits in case there shall be profits which can be divided, leaves the preferential shares on no better footing than though the dividend upon them had not been guaranteed, in other words, leaves the question whether such a dividend shall be declared and paid, for the determination of the directors of the corporation in the exercise of their discretion. The sound view plainly is that, where the corporation guarantees (as is sometimes the case) not only interest on the stock, but also agrees to receive back, or otherwise liquidate the principal of the shares at par, at

lated each year by the peculiar condition of the corporation at the close of the year." This is in conformity with the definition of profits as given in People v. Supervisors, 4 Hill (N. Y.), 20, by Bronson, J.: "Profits generally mean the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account." See, also, the reasoning in Belfast, etc., R. Co. v. Belfast, 77 Me. 445, 452; New York, etc., R. Co. v. Nickals, 119 U. S. 296.

[11] Warren v. King, 108 U. S. 389, 398. It follows from the above principles that a by-law which describes preferred stock as "non-cumulative" means that the arrearages of one year cannot be paid out of the earnings of a subsequent year: Belfast, etc., R. Co. v. Belfast, 77 Me. 445, 449, Hazeltine v. Belfast, etc., R. Co., 79 Me. 411, 1 Am. St. Rep. 330.

[12] Staples v. Eastman Photographic Materials Co. C. A. 1896, 2 Ch. 303, 74 Law T. Rep. 479. Compare Bishop v. Smyrna C. R. Co. 1895, 2 Ch. 265 (where it is held that money standing to the revenue account of a limited company at the date of "commencement of its liquidation, representing net profits earned by it to that date," is applicable to the payment of arrears of dividends due at that date to the preferred shareholders, in priority to the deficit on the capital account and the cost of liquidation).

[13] See Hazeltine v. Belfast, etc., R. Co., 79 Me. 411, 1 Am. St. Rep. 330, where the hardship and injustice of such a rule is forcibly and unanswerably pointed out by Peters, C. J. Scheme of preference under which the preferred shareholders had a right to participate with the common shareholders in any surplus after receiving their preferred dividends: Bailey v. Hannibal, etc., R. Co., 1 Dill. U. S. 174. Scheme of preference under which a dividend on the preferred shares might be paid although the capital of the company was impaired: Cotting v. New York, etc., R. Co., 54 Conn. 156. Right to pass the dividend in case of changes of ownership: Scheme of preference under which it was held that holders of preferred stock were entitled to such dividends, up to seven per cent., as the profits of a particular year would yield, before any dividends were paid to the common stockholders, although the deficiency of profits in one year was not to be made up in another year; and that, when a holder of preferred stock failed to claim his rights in certain years, a subsequent owner thereof could claim re-imbursement: Elkins v. Camden, etc., R. Co., 36 N. J. Eq. 233.

a date named, then the certificates become substantially an interest-bearing bond of the corporation, and the holder to the fullest extent a creditor, although he may *also* have rights pertaining to a shareholder, such as the right to *vote* at corporate meetings. It has been pointed out that, under some schemes, what has been called "preferred stock" is really an interest-bearing debenture of the corporation, which creates the relation of debtor and creditor between the corporation and the so-called shareholder.[14]

Where, in addition to the guaranty of interest at the rate named, the stock is payable *in full* on a dissolution of the corporation next after the payment of debts, there is no room for any hesitation in holding that the guaranty of interest is absolutely and wholly independent of the question whether there are profits in any year whatever on which a dividend could be properly declared;[15] for here the share certificate is in the nature of an interest-bearing debenture.

§ 9. *Doctrine That Such a Guaranty is a Guaranty of Dividends Only in Case There are Profits That can be Divided*—There are, however, holdings to the effect that a general guaranty of dividends by a railroad company on its preferred stock is not a guaranty of payment in any event, but only in the event that the dividends are earned.[16] It has also been held that the holders of preferred stock or preference shares of a corporation, are entitled to dividends when there are profits out of which dividends may be declared, and not otherwise, although the resolution of the directors under which the stock is issued provides that "a semi-annual dividend of five per cent., payable in each year, shall be *guaranteed* by the company," and although the certificate of stock contains the recital "five per cent semi-annual dividend guaranteed;"[17] the reason being that such a construction of the contract would place the preferred in antagonism to the general shareholders and would be contrary to public policy.[18]

[14] Such was the case in West Chester, etc., R. Co. v. Jackson, 77 Pa. St. 321; in Burt v. Rattle, 31 Ohio St. 116; and in Williams v. Parker, 136 Mass. 204.

[15] Williams v. Parker, 136 Mass. 204.

[16] Miller v. Ratterman, 47 Ohio St. 141, 23 Ohio L. J. 416.

[17] Bailey v. Hannibal, etc., R. Co., 1 Dill. (U. S.,) 174.

[18] Lockhart v. Van Alystyne, 31 Mich. 76, 19 Am. Rep. 156 opinion by Cooley, J.

§ 10. *Such a Guaranty may Make the Right to Dividends Cumulative.* — Such a guaranty may, however, have the possible effect of making the right to the dividends *cumulative*, that is, of making the profits of one year make up the deficiencies of the preceding years.[19]

§ 11. *Whether a Preferential Share Certificate is a Certificate of Stock or Indebtedness.* —This question must be answered by the terms of the governing statute, of the resolution under which the preferred shares are issued, and of the recitals in the share certificates, all these elements entering into and forming a part of the contract. It has been ruled that where a resolution adopted by stockholders of a railroad company, authorizing the issue of preferred stock, recites that it is to be issued under an act which authorizes the issue of preferred stock, and not of certificates of indebtedness, referring to it by its title and date, which resolution is made a part of the certificates thereafter issued, such certificates will be held to be certificates of stock, unless, considering the whole transaction, it is clear that the purpose was to create a debt, and unless a debt was in fact created.[20]

§ 12. *Guaranteed Stock Creates a Lien Superior to General Creditors.* — Where a manufacturing corporation, providing for the issue of preferred stock to pay debts, issued certificates of preferred stock, so-called, certifying that the corporation *guaranteed* to to holders the payment of four per cent. semi-annual dividends, and the final payment of the entire amount at a specified time, with the right to convert the preferred stock into common stock; and the company, at the same time, executed and delivered to a trustee its *bond and mortgage*, to secure the holders of such certificates,—it was held that the holders of the certificates did not thereby become stockholders or members of the corporation, but its creditors; and that, as such creditors, they had a lien upon the mortgaged property, superior to that of general creditors of the corporation, or to its assignees.[21]

§ 13. *Preferred Shareholders not Entitled to Priority Over Creditors.*—Excluding from

[19] Prouty v. Michigan, etc., R. Co., 4 Thomp. & C. (N. Y.) 233.

[20] Miller v. Ratterman, 47 Ohio St. 141, 23 Ohio L. J. 416.

[21] Burt v. Rattle, 31 Ohio St. 116.

consideration the holders of shares upon which dividends are guaranteed by the corporation, it may be stated generally, that preferred shareholders occupy the *status* of shareholders or members and that their right of preference is only a right of preference in the distribution of dividends over the common shareholders. It seems that such a shareholder has no preference over creditors upon the winding up of the corporation;[22] but that his rights are to have his preferred dividends in case there is a surplus which can properly be divided among the shareholders, and there can be no such surplus so long as debts of the corporation remain unpaid as they mature,[23] and creditors who surrender their debentures for preferred stock remit themselves to this position; for by so doing they cease to be creditors and become stockholders.[24]

§ 14. *Nor Over Other Shareholders in Final Winding-up and Distribution.* — Nor does a mere right to a preference in receiving dividends *out of profits* give a right of preference over other shareholders in the distribution of the company's assets on a final winding-up. The preferred shareholder is still a shareholder, and is entitled to whatever preference his contract gives him, and to no more.[25]

§ 15. *Preferred Shares may be Issued Without the Right to Vote.*—Ownership of shares in a corporation carries with it, as a general rule, the right to vote with respect to the same at any meeting of the stockholders. But to this rule there may be exceptions; the voting power can be lawfully separated from shares; and it has been held competent for a railroad company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote the same, as the owners of the same, at any meeting of the holders of the capital stock of the company.[26]

§16. *Remedy of Preferred Shareholders by Action at Law.*— An action at law has been allowed against a corporation on a contract to make a dividend of its earnings;[27] and in a plain case of the breach of such a contract no reason is perceived why such an action would not lie. But, manifestly, such an action does not lie where the nature of the contract, or its judicial construction is such as to leave the question of the propriety of declaring the dividend, to the discretion of the directors.[28]

§17. *Remedies in Equity.*—The contract which gives the preferred shareholders a right to a dividend out of the net earnings impresses any net earnings in the hands of the directors, for the particular year, with a *trust* in behalf of the preferred shareholders, to the extent required by the terms of the contract. If the directors refuse to perform that trust by making the distribution, a court of equity will, obviously, in a suit in which the parties in interest are made defendants, compel them to do so.[29] But this is not so where the contract, as judicially construed, leaves the question of declaring and paying the preferred dividend to the discretion of the directors. In such a case it was held that a court of equity would not compel the declaration of a dividend on preferred shares out of net profits from which the directors had a right to make the dividend payable cumulatively, where, for half the time for which the dividends were claimed, there were no net profits, and where the condition of the corporation was such that the court could not say that the payment of

[22] *Re* London India Rubber Co., L. R. 5 Eq. 519; Griffith v. Paget, 6 Ch. Div. 511.

[23] Warren v. King, 108 U. S. 389, affirming, 2 Fed. Rep. 36 (holding that the preferred shareholders had no claim on the property superior to that of creditors whose debts were contracted by the company subsequently to the issue of the preferred stock, and that their only valid claim was one to the priority over the holders of common stock).

[24] St. John v. Erie R. Co., 22 Wall. (U. S.), 136, affirming, 10 Blatchf. (U. S.), 271.

[25] Griffith v. Paget, 6 Ch. Div. 511. The separate assent of the preferred shareholders, as a class, is not necessary on an "arrangement" under § 12, of the English Company's Act. 1667; *Re* Brighton, etc., R. Co., 44 Ch. Div. 28.

[26] Miller v. Ratterman, 47 Ohio St. 141, 23 Ohio L. J. 416.

[27] Bates v. Androscoggin, etc., R. Co., 49 Me. 491. Compare Taft v. Hartford, etc., R. Co., 8 R. I. 310, 5 Am. Rep. 575, which was an action of *assumpsit*.

[28] Field v. Lamson, etc., Man. Co., 162 Mass. 388, 27 L. R. A. 136, 38 N. E. Rep. 1126 (holding that the right to dividends on preferred stock, which was possible out of net profits, cannot be enforced in an action at law, even if there are net profits out of which they might be paid, if no dividend has been declared).

[29] This was done in Hazeltine v. Belfast, etc., R. Co., 79 Me. 411, 1 Am. St. Rep. 330, 19 Am. & Eng. Corp. Cas. 456, 10 Atl. Rep. 328, 30 Am. & Eng. R. Cas. 528, 4 New Eng. Rep. 704. See, also, Ashbury v. Watson, L. R. Co., 30 Ch. 376, and New York, etc., R. Co. v. Nickals, 119 U. S. 296 (reversing, 21 Blatchf. (U. S.), 177 and Nichals v. New York, etc., R. Co., 15 Fed. Rep. 575); McIntosh v. Flint, etc., R. Co., 32 Fed. Rep. 350, 1 Rail. & Corp. L. J. 299; Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157.

dividends might not injure the concern, or that the withholding of them might not be judicious.[30]

§18. *Scope of the Remedy in Equity.* — Where the dividends are not paid upon *preferred stock* in pursuance of the terms of the contract, the holders of such stock may maintain an equitable action to compel a specific performance of the contract and to restrain the payment of dividends on the common stock until the arrears of their preferred dividends shall have been paid.[31]

§19. *Remedy in Equity of the Holders of Guaranteed Stock.*—So, it has been held, that a suit in equity may be maintained by the holders of *guaranteed stock* to compel the corporation to allow them to participate, equally with the holders of the common stock, in any larger dividends declared in favor of the latter after the payment to the plaintiffs of the preferential or guaranteed dividends;[32] that such a suit is to be treated as a creditor's bill, in such a sense that the remedy accorded by the decree settling the rights of the parties, accrues in favor of *all* the guaranteed stockholders, whether parties to the suit or not; that a reference should be made to a *commissoner* to ascertain, state, and report who are the other holders of guaranteed stock, and in what shares money dividends are coming to them under the decree settling the rights of the parties; and further, that proper steps should be taken for the allowance of *counsel fees* against the guaranteed stockholders not already represented by counsel.[33] SEYMOUR D. THOMPSON.

[30] Field v. Lamson, etc., Man. Co., 102 Mass. 388, 27 L. R. A. 136, 38 N. E. Rep. 1126. Much to the same effect see: McLean v. Pittsburgh Plate-Glass Co., 159 Pa. St. 112, 33 W. N. C. (Pa.), 459, 24 Pitts. L. J. (N. S.), 337, 28 Atl. Rep. 211.

[31] Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157.

[32] Gordon v. Richmond, etc., R. Co., 78 Va. 501.

[33] Gordon v. Richmond, etc., R. Co. (on second appeal), 81 Va. 621. An action to secure the application of future earnings of a corporation to the payment of dividends due holders of preferred stock, is properly brought by one of the holders of such stock on his own behalf, and on the behalf of otners having like grounds of complaint: Prouty v. Michigan, etc., R. Co., 4 Thomp. & C. (N. Y). Common stockholders not proper parties defendant: Prouty v. Michigan, etc., R. Co., *supra*. Minutes of the corporation showing the resolution of the directors authorizing the issue of the preferred shares are evidence: Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157. Laches of common stockholders preventing them from undoing a scheme by which preferred shares have been issued: Sullivan v. Portland, R. Co., 4 Cliff. (U. S.), 212.

RIGHT TO JURY TRIAL IN EQUITABLE ACTIONS WHERE IT APPEARS THAT THE RIGHT TO EQUITABLE RELIEF HAD PASSED AWAY AFTER COMMENCEMENT OF SUIT.

McNULTY v. MT. MORRIS ELECTRIC LIGHT CO.

Court of Appeals of New York, November 18, 1902.

Where a lessee joined with others in a suit to restrain a nuisance merely to avoid multiplicity of suits on the expiration of the lease and the vacation of the premises prior to the trial the action became a mere legal claim for damages, without any equitable features, entitling defendant to trial by jury, unless it had been waived.

PARKER, C. J.: I agree with Judge Bartlett's conclusion that there should be a new trial in this action, but differ with him in so far as he holds that the trial court did not err in refusing to grant defendant's motion to have the action tried on the common-law side of the court. It appeared when this case was moved for trial that the plaintiff was not then entitled to equitable relief, although he was so entitled at the time of the commencement of the suit. It is undoubtedly the rule, and long has been, that when equity takes jurisdiction it will draw to itself all matters necessary to a final disposition of the controversy, as, where an injunction is granted, if damages have resulted by reason of the acts restrained, equity will admeasure and award the damages as part of the relief. But while equity has this power, it will not exercise it for the purpose of depriving a litigant of his right of trial by jury,—"the fundamental guaranty of the rights and liberties of the people,"—when the question of damages is the only question presented for decision. Courts are jealous in protecting this great right, instead of seeking opportunities for depriving litigants of it. This action was properly brought on the equity side of the court, but, before the cause was reached for trial, plaintiff had passed out of the possession of the property, thus parting with the right to the injunction, and there remained to him only his claim for damages. For that reason, defendant's motion to have the action tried before a jury should have been granted.

The authorities cited in support of the contrary position do not, in my judgment, sustain it. The first is Van Allen v. Railroad Co., 144 N. Y. 174, 38 N. E. Rep. 997, brought by the owner of premises abutting on a street through which an elevated road ran, to restrain the operation and maintenance of the road, and for damages. Plaintiff sold the premises before the trial, and thereby parted with his right to an injunction, leaving only the question of damages. Counsel for both parties, however, stipulated that the action be sent to a referee to determine all the issues. It was not until the action came on before the referee that defendant attempted to raise the point that he was entitled to have the question of damages submitted to a jury. It was then too late. As this court said (page 178, 144 N. Y., and page 998, 38 N. E. Rep.): "The defendants were not entitled

to a jury trial, for the reason that they had waived it by consenting that the claim for damages should be referred with the claim for an injunction, and the fact that the latter had been transferred to another by the conveyance, at the trial or during the pendency of the action, did not deprive the referee of jurisdiction, so long as any cause of action remained. The right of trial by jury having been waived, there was no longer any question except whether the trial should be had in a court of law or a court of equity; and, since both remedies are now administered by the same court and under the same procedure, the defendants' contention related to forms, and not to matters of substance, and was not material." The next case cited is Valentine v. Richardt, 126 N. Y. 272, 27 N. E. Rep. 255, in which plaintiff sought to set aside the conveyance made to defendant Richardt on the ground that it was fraudulent and void as against him, and upon the trial it was held to be fraudulent and void; but the court could not vest title in plaintiff, because Richardt had sold the land to a purchaser in good faith. The conclusion, however, was reached that a court of equity could require Richardt to turn over to plaintiff the money he had received for the land, inasmuch as he had put it out of his power to convey the land. In this court it was said: "The fraudulent conveyance which the defendant obtained from the owner of the land enabled him to sell it to a purchaser in good faith, and the money that he received therefor, with the interest thereon, can, for all the purposes of this case, be considered in equity as the land itself." It is apparent from the decision, therefore, that this case is not an authority on the proposition, and it should also be noted that no such question was raised by motion or otherwise either before or at the trial. In the next case cited (Koehler v. Railroad Co., 159 N. Y. 218, 53 N. E. Rep. 1114), the grantee of the original plaintiff was brought in as a party plaintiff before trial, and though the defendant opposed the order joining him as plaintiff, no motion was made to go to the jury until the trial. This court said (Judge Bartlett writing); "It thus appears that the question of defendant's strict right to a jury trial in a case where seasonable application had been made was not presented for adjudication." Also: "The presence of the present owner as plaintiff preserves the equitable features of the case, and permits the court, sitting in equity, to retain jurisdiction." Henderson v. Railroad Co., 78 N. Y. 423, holds simply that, when a court of equity grants an injunction, it may also grant with it the incidental relief of damages. All the land abutting on the street had been sold, but the court enjoined the defendant railroad from using the street until it had acquired plaintiff's title thereto. The court alluded to the question of plaintiff's right to recover the damages accrued to the property sold, but said that question "has not been raised upon this appeal, nor was any objection made upon that ground before the referee. We are not, therefore, embarrassed by it." When an equitable suit for an injunction, to which has been joined, as a mere incident and to avoid multiplicity of suits, a legal claim for damages, is, by plaintiff's conveyance of the land, shorn of all its equitable features, leaving nothing but a legal claim for damages, the right to a trial by jury cannot be denied unless it has been waived, as was done by the defendant in Pegram v. Railroad Co., 147 N. Y. 135, 41 N. E. Rep. 424, where the court said: "Had the objection been raised in a proper way or at the proper time, I think the defendants could have insisted upon a trial upon the law side of the court. * * * But not having done so, it was not error" for the court, sitting in equity, to assess the damages.

So far I have considered this matter as if the inquiry were whether, in every action brought to secure equitable relief, the court should on motion, send the case to a jury for trial, upon its appearing that the right to equitable relief had passed away after the commencement of the suit. And I shall conclude in that vein. But the fact should not be lost sight of that in cases of this character, viz., actions to abate a nuisance and recover the damages occasioned thereby, trial by jury is a matter of right for the defendant, even if the complaint is in form as for equitable relief against the continuance of a nuisance, the prayer for damages being incidental thereto. And this is so because prior to the adoption of the constitution the existence of an alleged nuisance and the amount of damages were both submitted to a jury for decision, and hence the constitutional guaranty of trial by jury applies to such an action, as one of the "cases in which it has been heretofore used." Hudson v. Caryl, 44 N. Y. 553; Cogswell v. Railroad Co., 105 N. Y. 319, 11 N. E. Rep. 518. The two cases from the United States Supreme Court which have been cited (Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074; Clark v. Wooster, 119 U. S. 325, 7 Sup. Ct. 217, 30 L. Ed. 392) do hold that, in actions in United States courts for an injunction and damages for the infringement of patents, the fact that by the expiration of the patent the ground for an injunction has disappeared, does not preclude the court, sitting in equity, from granting the incidental relief of damages. But the reason for this rule in the United States courts is plain. Though the same courts have cognizance of both equitable and legal causes, the practice and the pleadings are entirely different for each class of cases, and, if a proceeding brought on the equity side of the court is not one of equitable cognizance, the cause must be dismissed, and a new proceeding must be instituted at law. Hipp v. Babin, 60 U. S. 271, 15 L. Ed. 633; Fenn v. Holme, 62 U. S. 481, 16 L. Ed. 198; Thompson v. Railroad Co., 73 U. S. 134, 18 L. Ed. 765; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. In Thompson v. Railroad Co.,

the court said: "Has a court of equity jurisdiction over such a case as is presented by this record? If it has not, the decree of the court below must be reversed, the bill dismissed, and the parties remitted to the court below to litigate their controversy in a court a law. * * * The constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. 'And although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.'" It appears, therefore, that while in our supreme court equitable and legal relief are possible under the same pleadings, and a strict enforcement of the rule that makes actions at law triable by jury would, in a case like the one at bar, result in no hardship, but would only entail a shifting of the cause from the equity to the law side of the court, the trial proceeding there on the same pleadings, in the United States courts the strict enforcement of the rule would necessitate the dismissal of the proceedings, and the plaintiff would be forced to begin a new action at law or abandon his cause. It seems plain to me, therefore, that the United States courts have adopted the practice disclosed by the two cases cited in order to avoid multiplicity of suits, and to save both parties from the hardship of resorting to another action for the decision of their controversy in a case where, when the suit was begun, plaintiff was entitled to equitable relief. And hence this court is not warranted in following the practice of the United States courts in this respect, thereby abandoning its own settled practice, which is not only workable, but more nearly conforms to the letter and spirit of the constitutional provision guaranteeing trial by jury. It follows, therefore, that the denial of defendant's motion for a jury trial in this case was error.

The judgment should be so modified as to grant a new trial, and, as so modified, affirmed; costs in all courts to abide the event.

NOTE. — *Right to Jury Trial in Equitable Actions Where it Appears that the Right to Equitable Relief Had Passed Away After Commencement of Suit.* — It is a well-settled principle of jurisprudence that equitable actions are triable to the court, and that common-law actions are triable to a jury. The reason for this distinction is to be found in the origin of the procedure in equity. As is well known, equity came into existence for the purpose of providing remedies for injuries incurred for which the common law afforded no relief. In such cases a petition was filed with the king who referred it to his chancellor to give the needed relief. From this there grew up the important distinction heretofore referred to; and although the modern code procedure has abolished the separate courts, yet the distinction prevails, and becomes important under the code not only as to whether or not a case is triable by jury, but whether or not the case can be taken up on error or appeal, it being a general principal that cases in equity are appealable, and jury cases to be taken up on error. The decision of the court in the principal case stands alone so far as appears from the case itself or from research. The exact questions raised can perhaps be better understood by the statement of the case made by the dissenting judge, (Bartlett, J.), who said:

"The plaintiff brought this action for an injunction and damages against the defendant, the Mt. Morris Electric Light Company. The plaintiff was the tenant of No. 525 Greenwich street, in the city of New York, and the defendant's plant was adjacent thereto. The complaint alleges, in substance, that the defendant so negligently constructed and conducted the property, and operated the machinery therein as to discharge upon the premises of the plaintiff great quantities of soot, cinders, ashes, and noisome gases, unpleasant odors, water, and steam; also causing incessant noises and very great jar and vibration, etc., affecting the health and peaceable enjoyment of the occupants. At the time this action was begun the plaintiff was in occupancy of the premises under his lease; but when the trial commenced his lease had expired, and he had moved out. Prior to the trial the defendant made a motion for leave to serve an amended and supplemental answer, which was granted. This answer was duly served, setting up the expiration of the lease and the vacation of the premises. The cause coming on for trial at special term, on the equity side of the court, the defendant moved that it be stricken from the calender upon the ground that the issue remaining could not be tried; that the plaintiff asks for an injunction; that, inasmuch as he is not now in possession of the property, he is not entitled to an injunction; that the action is therefore a common-law action for damages, and not an action for an injunction, and not an action over which equity has any jurisdiction. The trial judge denied this motion, and, after the introduction of evidence by both parties, rendered judgment in favor of the defendant, to the effect that the plaintiff, having removed from the premises prior to the trial, is not entitled to an injunction, but that the court could, notwithstanding, retain jurisdiction of the action for the purpose of assessing plaintiff's damages; that he is entitled to judgment for $1,189.05 damages, together with interest, costs, and an extra allowance of 5 per centum."

In the dissenting opinion the proposition is laid down that the jurisdiction of a court of equity depends upon the position of the plaintiff and the relief he is entitled to at the time of the bringing of his action, and if the jurisdiction has once attached, it is not affected by subsequent changes, so long as any cause of action survives. This is the exact language of the syllabus laid down in the case of Van Allen v. T. N. Y. E. Ry. Co., 144 N. Y. 174: "although for that there may be an adequate remedy at law." This case is quoted with approval in Koehler v. N. Y. Elevated Ry. Co., 159 N. Y. 223. In an earlier case in the same state, Valentine v. Richardt, 126 N. Y. 272, it was held "a court of equity having obtained jurisdiction of the parties and the subject-matter of an action may adapt its relief to the exigencies of the case; it may give to the plaintiff a money judgment simple when that form of relief becomes necessary in order to prevent a failure of justice, and when it is for any reason imprac-

ticable to grant the specific equitable relief demanded."

So it will be seen that there was sufficient ground for the dissenting judges in the principal cases to form their opinion upon, and sufficient to have authorized the court to have held otherwise. In the principal case the court does not found its decision upon any reported case, but simply lays down the law as it believes it ought to be. It cites no cases in its favor, but merely shows, or attempts to show, that there are no decisions preventing it from laying down the law as it believes it should be. The cases cited from the Supreme Court of the United States are explained away upon the theory, that there the common-law and equitable procedure is yet separate and distinct, and that therefore the reasons which exist for the Supreme Court of the United States could not apply to a code state where legal and equitable actions are tried in the same forum, although in a different manner. Whether or not a right to trial by jury exists must be determined from the object of the action as determined by the averment of the petition, and in cases of ambiguity, by resort to its prayer: and if an action is triable by jury it will not be defeated if it becomes necessary to determine issues as to the existence of equitable rights. Yager v. Exchange Bank, 72 N. W. Rep. 211. The effect of an answer or reply setting forth equitable matters in common law action, and *vice versa*, came before a *Nisi Prius* judge in Ohio. Bank v. Brown, 12 Dec. 67, and there is laid down what perhaps is the true rule, when it is said: "We have examined all the authorities cited by counsel upon either side, and find that they are not altogether reconcilable. But from the examination we have given, we are of the opinion that they lay down the general principle that wherever a legal cause of action is set forth in the petition and an answer is filed thereto setting up an equitable defense which, if true, would extinguish the legal cause of action, the case is one for the court, and not for the jury; and on the contrary, that wherever a petition is filed setting forth an equitable cause of action, and an answer is interposed setting forth a legal defense which, if true, would extinguish the equitable cause of action set forth in the petition, and a reply filed to the answer controverting the issues of fact tendered in the answer, or answer and cross-petition, the answer and cross-petition and reply make up an issue of fact which must be tried to a jury, and not to the court." The following Ohio cases are cited in this opinion. Massie v. Stradford, 17 Ohio St. 596; Taylor v. Leith, 26 Ohio St. 428; Buckner v. Mear, 26 Ohio St. 516; Bruckhardt v. Bruckhardt, 36 Ohio St. 261; Grapes v. Barbous, 58 Ohio St. 569.

The constitutionality of a jury trial exists only as it was at the time the constitution was adopted, and therefore there might be a more liberal rule applied in those states which had given to them their constitutional guarantee at the same time a code of procedure was carried into effect. This, of course, would apply to the newer states of the union, many of which never had a separate procedure for common-law actions. The provisions of the United States constitution guaranteeing a right of trial by jury does not apply to the states. It is only a restriction on the general government and the states may constitutionally abolish, alter, or amend the existing right of trial by jury. See cases cited 6 Am. & Eng. Encyc. of law, 2 Ed. 974. While the decision of the principal case seems to be a new one, yet it is one that will no doubt be followed in all code states. O'Day v. Coum. 131 Mo. 321, 43 Pac. Rep. 1097. See 11 Cent. L. J. 92; 22 Cent. L. J. 191.

JETSAM AND FLOTSAM.

MATRIMONIAL FELICITY.

The following plea for judicial mercy, showing every evidence of the touch of Barrister Nolan's fine Italian hand, will be found brimful of pathos and Nolanesque eloquence:

"To the Hon. Judge of the City Court, in Equity: Your petitioner, Samuel, would deferentially represent that on the 10th day of January, in the year of grace 1891, your honor dissolved the connubial ties theretofore existing between petitioner and his consort, Annie, granting her a divorce *a vinculo matrimonii*, with the beatific privilege thereunto annexed of marrying again, a privilege, it goes without saying, she availed herself of with an alacrity of spirit and a fastidious levity disdaining pursuit; but on this vital point your honor extended to petitioner only the charity of your silence.

"Petitioner has found in his own experience a truthful exemplification of Holy Scripture, that 'it is not well for man to be alone,' and seeing an inviting opportunity to superbly ameliorate his forlorn condition by a second nuptial venture, he finds himself circumvallated by an Ossa Pelion obstacle which your honor alone has power to remove.

"His days rapidly verging on the sere and yellow leaf, the fruits and flowers of love all going; the worm, the canker, and the grief in sight, with no one to love and none to caress him, petitioner feels an indescribable yearning, longing and heaving to plunge his adventurous prow once more into the vexed waters of the sea of Connubiality: Wherefore, other refuge having none, and wholly trusting to the tender benignity and sovereign discretion of your honor, petitioner humbly prays that in view of the accompanying fiats of a great cloud of reputable citizens, giving him a phenomenally good name and fair fame, you will have compassion on him and relieve him of the hymeneal disability under which his existence has become a burden, by awarding him the like privilege of marrying again; thus granting him a happy issue out of the Red Sea of troubles into which a pitiless fate has whelmed him. For, comforting as the velvety touch of an angel's palm to the fever-racked brow, and soothing as the strains of an Æolian harp when swept by the fingers of the night-wind, and dear as those ruddy drops that visit these sad hearts of ours, and sweet as sacramental wine to dying lips, it is when life's fitful fever is ebbing to it close to pillow one's aching head on some fond, wifely bosom and breathe his life out gently there.

"And in duty bound to attain the possibility of compassing such a measureless benediction, petitioner will pray without ceasing, in accents as loud and earnest as ever issued from celibatarian lips."

BOOK REVIEWS.

SHEPARD'S ANNOTATIONS.

Quite a unique and collosal undertaking in its way is the new uniform system of annotations, devised by Mr. Frank Shepard, covering all state and federal courts of last resort. We have already received those covering the reports of the Missouri Supreme Court, the Missouri Court of Appeals, the Federal Reporter, and the United States Supreme Court. These citations have four points of superiority. First: They show, not only where each case is reported in their own set of Reports, but also reported in the South Western Reporter, American Decisions, American Reports,

American State Reports, and where cited in the L. R. A., U. S. Supreme Court, the New York Reports, including the Court of Appeals, Appellate Division, Hun, Lansing, Thompson & Cook, Miscellaneous and Barbour. Second: They not only give all the subsequent citations of each case, but also show the precise point to which it has been cited, thus enabling the practitioner, at a glance, to ascertain the particular point of law or practice to which any case has been cited in the later decisions, thereby obviating the necessity of examining every volume where a case has been subsequently cited to find an authority in point. Third: Whether or not the principal case has been taken to the Supreme Court of the United States, and if so, what disposition was there made of it, whether affirmed, reversed, or writ of error dismissed. Fourth: Appropriate letters at the left of the volume number show at a glance whether a case has been affirmed, reversed, criticised, distinguished, explained, followed, harmonized, limited, modified, overruled, parallel case or same case, thus showing the present value of each case as an authority.

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CYCLOPEDIA OF LAW AND PROCEDURE, VOL. 5.

The fifth volume of this meritorious work has reached us, a ponderous, heavy, large sized page law book, of nearly 1200 pages. An idea of the magnitude of this immense undertaking may be partially understood from the fact that the subjects embraced, which are in alphabetical order, have at the close of this the the fifth volume come down only to the subject of Bridges; considerable yet to appear to finish the second letter of the alphabet. The publishers seem to have spared no expense in procuring the services of prominent and able writers to supervise the preparation of the various subjects, which in the present volume are: Bail, by Joseph A. Joyce and Howard C. Joyce; Bailments, by George H. Bates; Bankruptcy, by J. W. Eaton and Frank B. Gilbert; Banks and Banking, by Albert S. Bolles; Barratry, by Robert F. Walker; Bastards, by Frank E. Jennings; Bigamy, by Paul Pizey; Blasphemy, by James H. Malone; Bonds, by Joseph A. Joyce and Howard C. Joyce; Boundaries, by J. Breckenridge Robertson; Bounties, by Robert Grattan; Breach of Promise to Marry, by Gilbert E. Roe; Breach of the Peace, by William A. Johnston; Bribery, by J. Breckenridge Robertson; Bridges, by Frank E. Jennings. To the busy lawyer for making preliminary examination of any subject, these volumes will be found of great value, their function cannot go much beyond this, and by reason of their usefulness for ready reference, their convenience would have been increased had they been made into double the number of volumes and half their present thickness. The editors say there will be no splitting of the law titles in an arbitrary manner by which pleading and practice are usually separated from substantive law, but that pleading, references to suitable forms, evidence and questions of law and fact will be treated under one head. This encyclopedia will be found very useful as a pointer, a forerunner, but cannot expect to do away with the usefulness of text-books or be a complete law library in itself. The text-books will be required for a larger and more extended discussion of any legal topic. The editors are William Mack and Howard P. Nash. Published by American Law Book Company, New York.

BOOKS RECEIVED.

Commentaries on the Modern Law of Municipal Corporations, Including Public Corporations and Political and Governmental Corporations of every class. By John W. Smith, LL. D., of the Chicago Bar, Author of "Receiverships," "Equitable Remedies of Creditors," being a revised, re-written and enlarged edition of Beach on Public Corporations. In two Volumes, Indianapolis, The Bowen-Merrill Company, 1903. Sheep, pp. 2148. Price $12 Net. Review will follow.

A Treatise on Equity Pleading and Practice, with Illustrative Forms and Precedents. By William Meade Fletcher, B. L., of the Chicago Bar. Professor of the Law of Equity Pleading and Practice in the Law School of the Northwestern University. Saint Paul. Keefe-Davidson Company, 1902. Sheep, pp. 1403. Price $6. Review will follow.

The Kite Trust (a Romance of Wealth). By Lebbeus Harding Rogers. Kite Trust Publishing Company, 75 Maiden Lane, New York City. Price, $1.50. Review will follow.

A Code of Negligence, being the Law of the State of New York in Respect of Negligence and Kindred Subjects as Declared by its Court of Last Resort. (From January 1, 1798, to July 1, 1902) with References to all the Cases in the Appellate Division of the Supreme Court from its Organization January 1, 1896. Cases Codified, Condensed, Classified. By John Brooks Leavitt, LL.D., of the New York Bar. Albany, N. Y. Matthew Bender, 1903. Sheep, pp. 850. Price, $6.50. Review will follow.

HUMORS OF THE LAW.

"Gentlemen," said a judge, addressing the jury in a recent Irish case, "you have heard the evidence. The indictment says the prisoner was arrested for stealing a pig. The offense seems to be becoming a common one. The time has come when it must be put a stop to; otherwise, gentlemen, none of you will be safe."

"I haven't any case," said the client, "but I have money."

"How much?" asked the lawyer.

"Fifty thousand dollars," was the reply.

"Phew! you have the best case I ever heard of. I'll see that you never go to prison with that sum," said the lawyer, cheerfully. And he didn't—he went without a dollar.

Mr. Nolan was once retained by the defendant in a suit at law brought to recover payment of a gas bill, in which a witness for the plaintiff was asked:

"On what evidence do you conclude that sixteen thousand, seven hundred and forty feet of gas had been burned during the month by the defendant?"

"On the evidence of the gas meter," was the answer.

At which the Barrister impulsively exclaimed: "I wouldn't believe a gas meter under oath!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Suit by Administrator.—Where claim not presented to debtor's administrator is pleaded in set-off in action by the administrator, the objection to the plea should be by replication. — Hall v. Greene, R. I., 52 Atl. Rep. 1087,

2. ADOPTION — Relinquishment of Custody. — One who egally adopts a child has the right to its custody and control, and an agreement to relinquish the same must, in order to be enforced, be clearly established by evidence, and be distinct and unequivocal in its terms. — Monk v. McDaniel, Ga., 42 S. E. Rep. 360.

3. ADVERSE POSSESSION — Tacking.—The possession of the heir may be tacked to that of the ancestor in establishing a claim for adverse possession.—Epperson v. Stansill, S. Car., 42 S. E. Rep. 426.

4. ALIENS — Chinese Exclusion. — A Chinese woman, who lawfully entered the United States before the enactment of the exclusion laws, and lawfully remained until after their passage, and was thereafter legally married to a citizen of the United States, cannot be arrested and deported for failure to procure the certificate of residence required by the amendatory act of November 3, 1893, which was passed prior to her marriage. — Tsoi Sim v. United States, U. S. C. C. of App., Ninth Circuit, 116 Fed. Rep. 920.

5. ANIMALS — Trespassing Cattle. — Plaintiff cannot recover for trespasses of defendant's cattle; his lands being fenced merely with, and not from, theirs.—Oliver v. Hutchinson, Oreg., 69 Pac. Rep. 1024.

6. APPEAL AND ERROR — Appellate Practice. — Where there is a final decree dissolving an injunction and dismissing the bill, there can be no appeal solely from the order dissolving the injunction. — Burnham v. Driggers, Fla., 32 So. Rep. 796.

7. APPEAL AND ERROR—Bill of Exceptions.—Where no assignment of errors was presented to the judge on making an ordinary bill of exceptions, and the bill exhibits no sufficient statement of evidence, there is nothing to review.—Southerland v. Sandin, Fla., 32 So. Rep. 786.

8. APPEAL AND ERROR — Bill of Exceptions. — Where a motion for nonsuit was made and overruled, and a mistrial followed, a bill of exceptions assigning no error except the refusal to grant a nonsuit cannot be entertained by the supreme court. — Stewart Contracting Co. v. Jenkins, Ga., 42 S. E. Rep. 382.

9. APPEAL AND ERROR—Corrected Abstract.—Where an abstract of the record, not excepted to, shows no evidence to support the verdict, but the briefs show that there was some testimony to support it, the appellate court, where the omissions were not intentional, will call *sua motu* for either true abstracts of the record or additional copies, under the rules.—Turman v. Whaley, Fla., 32 So. Rep. 811.

10. APPEAL AND ERROR—Dismissal of Action.—Refusal to dismiss action is not appealable. — Meekins v. Norfolk & S. R. Co., N. Car., 42 S. E. Rep. 333.

11. APPEAL AND ERROR—Evidence.—The assignment of error that the court erred in admitting "all testimony" bearing on a given subject of inquiry is not properly made, because it fails to state, either literally or substantially, what was the evidence admitted. — Wright v. Roberts, Ga., 42 S. E. Rep. 369.

12. APPEAL AND ERROR — New Trial. — Action of the court on granting a nonsuit is reviewable on appeal from an order denying a new trial, when the denial is excepted to and specified as an error in the bill of exceptions used on the motion for a new trial. — Converse v. Scott, Cal., 70 Pac. Re . 13.

13. APPEAL AND ERROR — Premature Appeal. — An appeal from an order denying a motion to dismiss the action for want of valid service of summons is premature. —Jester v. Baltimore Steam Packet Co., N. Car., 42 S. E. Rep. 447.

14. APPEAL AND ERROR — Question of Fact. — Where, on appeal, a question has been held to have been one for the jury, and on a second trial the jury, on the same and additional evidence, have found the same way as before, the finding cannot be questioned.—Allen v. McKay & Co., Cal., 70 Pac. Rep. 8.

15. ARMY AND NAVY — Force and Scope of Regulation.—The army regulations are mandatory, and are intended to govern the conduct of the army and all work done under the superintendence of its officers wherever assigned to duty. — Moses v. United States, U. S. D. C., D. Wash., 116 Fed. Rep. 526.

16. ASSIGNMENTS—Redemption.—The statutory right of redemption from foreclosure sale being personal to the owner of the land, an attempted assignment of the right furnishes no consideration for a contract.—Terry v. Allen, Ala., 32 So. Rep. 664.

17. ASSIGNMENTS FOR BENEFIT OF CREDITORS — Local Creditor's Rights. — Rights of local creditors prevail against property in the state covered by a foreign voluntary assignment for creditors. — Bloomingdale v. Weil, Wash., 70 Pac. Rep. 94.

18. ATTACHMENT — Executors and Administrators.—Money in the hands of an executor or administrator is not liable to attachment.—Gorman v. Stillman, R. I., 52 Atl. Rep. 1088.

19. ATTACHMENT—Jurisdiction.—Where a defendant in attachment proceedings has done nothing to give the Georgia courts jurisdiction of its person, and no property within the state has been seized, it is proper to dismiss the entire proceeding.—Beasley v. Lennox-Haldeman Co., Ga., 42 S. E. Rep. 385.

20. ATTORNEY AND CLIENT—Contingent Fee.—Where a contract to pay an attorney a contingent fee for his services in a suit is valid under the law, and no claim is made that such a contract was obtained by unfair means, it is binding as to the proportion of the recovery agreed to be paid.—Muller v. Kelly, U. S. C. C., 116 Fed. Rep. 545.

21. ATTORNEY AND CLIENT — Setting Off Judgment.—Where plaintiff's attorney has a lien on plaintiff's judgment, it is to be preferred to the defendant's right to set off the judgment held by him against the plaintiff.—Pride v. Smalley, N. J., 52 Atl. Rep. 955.

22. BAIL—Money in Lieu of Bail.—Money deposited by an accused in lieu of bail must on discharge of bail be paid to defendant, and not to one who furnished the money.—People v. Gould, 77 N. Y. Supp. 1067.

23. BANKRUPTCY—Attorney's Fees.—The power to allow attorney's fees is a judicial, not an arbitrary, discretion vested in the court. When the fee asked for is exorbitant, even when recommended by the referee, no fee will be al-

lowed.—*In re* Carr, U. S. D. C., E. D. N. Car., 116 Fed. Rep. 556.

24. BANKRUPTCY—Compensation of Assignee.—A general assignee who was allowed by the creditors to retain possession of the assigned estate for several months before the filing of a petition in bankruptcy against his assignor, during which time he rendered services in preserving the estate, is entitled to the allowance of compensation therefor.—*In re* Klein, U. S. D. C., S. D. N. Y., 116 Fed. Rep 528.

25. BANKRUPTCY — Failure to Demur — A bankrupt's failure to demur to his creditors' specifications of objections to his discharge is not an admission of their legal sufficiency, so as to preclude him from relying on the fact that proof thereunder of his fraudulent conveyance is insufficient, under Bankr. Act, §§ 14b, 29b, to prevent his discharge —*In re* Crist, U. S. D. C., S. D. Ala., 116 Fed. Rep. 1007.

26. BANKRUPTCY—Fraudulent Transfer —The right of the creditors of a bankrupt to pursue and reclaim property transferred fraudulently by an insolvent debtor as a voluntary gift is not limited to such transfers made within four months of the institution of the bankruptcy proceedings.—*In re* Schenck, U. S. D. C., 116 Fed. Rep. 554.

27. BANKRUPTCY—Garnishment. — An adjudication in bankruptcy, whether made in voluntary or involuntary proceedings, renders void a judgment against a garnishee, rendered in an action brought against the bankrupt within four months prior to the filing of the petition, and while he was insolvent —*In re* Beals, U. S. C. C., D. Ind., 116 Fed. Rep. 530.

28. BANKRUPTCY—Material Man's Lien.—The rights of a materialman who serves a stop notice on the owner prior to the filing of a petition in bankruptcy by the contractor are enforceable in a state court.—South End Imp. Co. v. Harden, N. J., 52 Atl. Rep. 1127.

29. BANKRUPTCY—Mortgage.—Where a bankrupt purchased personal property expressly subject to a mortgage thereon, which he assumed and agreed to pay, he and his trustee are estopped to question the validity of the mortgage —*In re* Standard Laundry Co., U. S. C. C. of App., Ninth Circuit, 116 Fed. Rep. 476.

30. BANKRUPTCY—Notes Paid by Surety.—A wife who signed notes as joint maker with her husband for money borrowed by him from her mother, which notes she received as part of her share of her mother's estate, held entitled to prove the same against the estate of her husband in bankruptcy.—*In re* Nickerson, U. S. D. C., D. Mass., 116 Fed. Rep. 1003.

31. BANKRUPTCY—Preference.—A payment realized by a creditor after the debtor's bankruptcy from property transferred to him as security for an antecedent debt within the four-months' period, and while the debtor was insolvent, constitutes a preference which must be surrendered by the creditor before he can prove his debt.—*In re* Belding, U. S. D. C., D. Mass., 116 Fed. Rep. 1016.

32. BANKRUPTCY—Preference.—In order to constitute an illegal preference under Bankr. Act 1898, the creditor must have had reasonable cause to believe that it was intended to give a preference.—Sirrine v. Stoner-Marshall Co., S. Car., 42 S. E. Rep. 482.

33. BANKRUPTCY—Proceedings Against Third Persons —A court of bankruptcy has jurisdiction to cite before it a third person to show cause with respect to a transaction affecting the property of a bankrupt, and to determine for itself, on his answer, whether it has final jurisdiction to adjudicate the questions raised.—*In re* Waukesha Water Co., U. S. D. C., E. D. Wis., 116 Fed. Rep. 1009.

34. BANKRUPTCY—Trustee.—A referee has no power to appoint a trustee merely because he disapproves the appointment made by the creditors; but, in that case, another meeting of creditors must be called to make a new appointment.—*In re* Mackellar, U. S. D. C., M. D. Pa., 116 Fed. Rep. 547.

35. BANKS AND BANKING — Mortgages. — Though a national bank is not authorized to take mortgages upon real estate, it may be substituted to the rights of a surety who has taken such a mortgage.—Magoffin v. Boyle Nat. Bank, Ky., 69 S. W. Rep. 702.

36. BENEFIT SOCIETIES — Change of Beneficiary.—Where a member of a beneficiary society knowingly failed to pay the fee required by the by-laws to be paid on changing his beneficiary, though he took all other prescribed steps, and the change was not completed during his lifetime, the attempted change was ineffectual.—Stringham v. Dillon, Oreg., 69 Pac. Rep. 1020.

37. BENEFIT SOCIETIES — Membership.—Applicant for membership in benefit society, dying before certificate received, held not a member thereof.—Roblee v. Masonic Life Assn. of Western New York, 77 N. Y. Supp. 1098.

38. BENEFIT SOCIETIES — Relief Fund.—Relief fund of foreign benefit order must be distributed pro rata among disabled members and beneficiaries on insolvency of the order.—National Park Bank v. Clark, 77 N. Y. Supp. 1089.

39. BILLS AND NOTES — Joint and Several.—A note executed by two persons, one signing at the bottom and the other upon the back, the latter not being the payee, and the note being written, "I promise to pay," is a joint and several note; and the person whose name appears upon the back is, according to the facts connected with his understanding, liable thereon either as a co-principal or a surety.—Booth v. Huff, Ga., 42 S. E. Rep. 881.

40. BONDS—Primary Liability.—A bond required by employer good conduct of employee held a primary liability, so that doctrine of laches does not apply.—Walker v. Brinkley, N. Car., 42 S. E. Rep. 333.

41. BROKERS—Contract. — Where an offer to sell, made through a broker, is accepted subject to confirmation by the principal, the contract is not complete, and may be canceled before confirmed.—Johnston v. Fairmont Mills, U. S. C. C., D. S. Car., 116 Fed. Rep. 537.

42. CANCELLATION OF INSTRUMENTS — Husband and Wife.—In an action to cancel a deed to a married woman and obtain a reconveyance, her husband is a proper party, as he should be required to join in the reconveyance.—Gorman v. McHale, R. I., 52 Atl. Rep. 1063.

43. CANCELLATION OF INSTRUMENTS — Release by Legatee.—On a bill by legatee to set aside as fraudulent release to executor, fact that the latter's account was in process of settlement at law held no ground for demurrer —Gorman v. McCabe, R. I., 52 Atl. Rep. 989.

44. CARRIERS — Delay in Transporting Goods.—A railroad company held liable for failure to transport goods within a reasonable time, though instructed by a third person whom it was directed to notify of the arrival of the goods not to do so. — Florida Cent. & P. R. Co. v. Berry, Ga., 42 S. E. Rep. 871.

45. CARRIERS—Failure to Deliver.—In an action against a carrier for failure to deliver freight, evidence that the consignees had never received the freight was admissible.—Alabama Midland Ry. Co. v. Thompson, 32 So Rep. 672.

46. CARRIERS—Negligence of Lessee.—Lessor of steamboat held not liable for injury to passenger from negligence of lessee.—Phelps v. Windsor Steamboat Co., N. C., 42 S. E. Rep. 335.

47. CARRIERS—Use of Ticket on Day of Sale.—A placard or notice, posted by a railroad company at its ticket office, announcing that tickets of a certain class must be used on the day of sale, held not admissible in the company's favor in a suit by a passenger for an alleged wrongful ejection. — Georgia R. Co v. Baldoni, Ga., 42 S. E. Rep. 314.

48. CHATTEL MORTGAGES — Failure of Petition to Describe Property.—In an action to enforce a chattel mortgage, the failure to describe the property in the petition does not render the judgment void.—Day & Congleton Lumber Co. v. Mack, Ky., 69 S. W. Rep. 712.

49. CONSPIRACY — Merger of Misdemeanor in Felony.—Defendant was properly convicted of the offense of conspiracy to defraud under an indictment charging that offense, though the offense thus charged is a misdemeanor, and the facts alleged showed that the acts

done amounted to a felony. — Wait v. Commonwealth, Ky., 69 S. W. Rep. 697.

50. CONSTITUTIONAL LAW — Impairment Contract.— Where the incorporation laws of a state reserve the power to alter or repeal the charters rof all corporations an amendatory ac authorizing corporations to issuet bonds for the purpose of retiring a portion of their stock does not impair the contract of a stockholder.- C. H. Venner Co .v. United States Steel Corp., U. S. C. C., S. D. N. Y., 116 Fed. Rep. 1012.

51. CONSTITUTIONAL LAW — Police Power.—Rev. St. §§ 1210, 1211, prohibiting the grazing and herding of sheep within two miles of inhabited dwellings, is a valid exercise of the police power of the state.—Sweet v. Ballentine, Idaho, 69 Pac. Rep. 995.

52. CONTRACTS—Acceptance of Offer.— An answer to an offer will not amount to an acceptance, so as to result in a contract, unless it be unconditional and identical with the terms of the offer.— Monk v. McDaniel, Ga., 42 S. E. Rep. 360.

53. CONTRACTS—Action for Breach.—The right of action of one party to a contract, accruing on the other party's breach, is not affected by a subsequent offer to perform. —Emack v. Hughes, Vt., 52 Atl. Rep. 1061.

54. CONTRACTS— Construction by Parties. — A referee's finding that an agreement between the parties to a contract made subsequently thereto did not affect the contract held to mean that the parties did not intend that the contract should be affected.—Drew v. Goodhue, Vt., 52 Atl. Rep. 971.

55. CONTRACTS—Inability to Read English.—A contract cannot be avoided by a party on the ground that he could not read English, and did not understand it when he signed it, where he is a man of ordinary intelligence, and no claim is made that it was obtained by the other party by unfair means.—Muller v. Kelly, U. S. C. C., E. D. Pa., 116 Fed. Rep. 545.

56. CONTRACTS — Securing Nomination for Office. — A contract by plaintiff to use the influence of his newspaper to secure defendant's nomination for a political office is void, as against public policy. — Livingston v. Page, Vt., 52 Atl. Rep. 965.

57. CORONERS—Fees.—A coroner who himself summons a jury to hold an inquest is not entitled to any fee for such service. — Davis v. Bibb County, Ga., 42 S. E. Rep. 408.

58. CORPORATIONS—Notes.— A draft drawn by the authorized agent of a corporation on it or the treasurer thereof in favor of a third party, for a debt due him by the corporation, is, in effect, the note of the corporation. National Fire Ins. Co. v. Eastern Building & Loan Assn., Neb., 91 N. W. Rep. 482.

59. COUNTIES — Suits Against. — The provision of the constitution of 1877 that all suits by or against counties shall be in the name thereof did not affect suits pending at the time of the adoption of the constitution.— Conyers v. Commissioners of Roads and Revenues, Ga., 42 S. E. Rep. 419.

60. COURTS—Records.—The records of the proceedings of the district court, kept in its journal entries, is the legal evidence of judgments and orders of the court. — Morrill v. McNeill, Neb., 91 N. W. Rep. 601.

61. COVENANTS—Action for Breach. — A petition in an action for a breach of warranty alleged to be contained in a deed is open to special demurrer if it does not set forth, at least in substance, a sufficiency of the contents of such deed to show the covenant of warranty sued on.— Gano v. Green, Ga. 42 S. E. Rep. 371.

62. CRIMINAL EVIDENCE —Admission. — The statement of a codefendant, made subsequent to an alleged offense, is admissible against the defendant on trial, where it is shown to have been in his presence and expressly assented to by him.—Anthony v. State, Fla., 32 So. Rep. 818.

63. CRIMINAL LAW — Newly Discovered. — Where newly discovered evidence relied on as a ground for a new trial is merely cumulative and impeaching in character, it does not afford sufficient cause for setting aside the verdict.—Davis v. State, Ga., 42 S. E. Rep. 382.

64. CRIMINAL LAW — Commitment to Penitentiary. — Detention of a convict from the penitentiary, after sentence, for the purpose of quarantine, held not unreasonable, entitling him to a discharge. — O'Neil v. State, Ala., 32 So. Rep. 667.

65. CRIMINAL LAW—Receiving Stolen Goods.—Acquittal for burglary will not support a plea of *autrefois acquit* under an indictment for receiving stolen goods. — Pat v. State, Ga., 42 S. E. Rep. 389.

66. CRIMINAL LAW—Venue of Crime. — Where the evidence wholly fails to show in what county or state the crime was committed, a judgment of conviction will be reversed.—McKinnie v. State, Fla., 32 So. Rep. 786.

67. CRIMINAL TRIAL — Defective Verdict. — Where by consent the jury after agreement dispersed, and thereafter returned a defective verdict, the court cannot order it amended to cure such defect.— Wells v. State, Ga., 42 S. E. Rep. 390.

68. CRIMINAL TRIAL— Homicide. — On a trial for murder, where insanity is a defense, the proceedings and judgment of the county court adjudging the accused insane, under the provisions of Laws 1895, ch. 4357, are admissible in evidence. — Davis v. State, Fla., 32 So. Rep. 822.

69. CRIMINAL TRIAL— Opinion Evidence. — A question asked a nonexpert witness, as to what, in his opinion, must have been the necessary position of the hand and pistol of a person who shot another in a particular manner, held properly excluded. — Jones v. State, Fla., 32 So. Rep. 793.

70. CRIMINAL TRIAL — Self-Serving Declarations.—The accused in a criminal case is not entitled, as a matter of right, to the privilege of making a supplemental statement to the jury.—Dixon v. State, Ga., 42 S. E. Rep. 357.

71. DEATH— Survivorship. — There is no presumption that one of two persons perishing in the same disaster survived the other.—Supreme Council of Royal Arcanum v. Kacer, Mo., 69 S. W. Rep. 671.

72. DEEDS— Transfer of Bid at Decretal Sale. — When the accepted bidder at decretal sale signed and delivered a transfer of his bid, and accepted and indorsed the check given to him therefor, and delivered it to his assignee for creditors, the transfer became operative, and he could not thereafter recall it. — Ewing v. Stanley, Ky., 69 S. W. Rep. 724.

73. DESCENT AND DISTRIBUTION — Proportionate Liability.—In an action by a creditor of a testator against a legatee, no greater amount can be recovered than the legatee's proportionate share of the debt, as defined by Gen. St. 1894, § 5921.—Hunt v. Grant, Minn., 91 N. W. Rep. 485.

74. DISTRICT AND PROSECUTING ATTORNEY — Value of Services. — The allowance by the district court for the services of an attorney it has appointed to assist in a criminal case is at least *prima facie* proof of the value of the services. — Board of Comrs. of Hinsdale County v. Crumpp, Colo., 70 Pac. Rep. 159.

75. DIVORCE—Abandonment.—Where the husband married the wife to end a prosecution for seduction, the fact that she refused to live with him did not entitle him to a divorce on the ground of abandonment, where she offered in a few days thereafter to live with him as his wife — Alderson v. Alderson's Guardian, Ky., 69 S. W. Rep. 700.

76. DIVORCE—Advice of Counsel.—That an action for divorce was begun by advice of counsel, based on allegations of fact which complainant knew to be false, is no bar to suit by husband, unless all the facts pertinent to the issue were truly stated to the counsel. — Weigel v. Weigel, N. J., 52 Atl. Rep. 1123.

77. DIVORCE—Illegal Intercourse Prior to Marriage. — An Act of illicit intercourse, committed by a party to a marriage contract prior to marriage, is not a ground of divorce —Stanley v. Stanley, Ga., 42 S. E. Rep. 374.

78. ELECTIONS—Official Ballots.—In official ballots for primary elections, blank spaces need not be left after the

name of the last candidate for each office for an elector o write the name of the candidate of his choice. — State v. Johnson, Minn., 91 N. W. Rep. 604.

79. EMINENT DOMAIN— Condemnation Proceedings. — Regularity of condemnation proceedings by a railroad company in not furnishing owners with description of land, as provided by Acts 1849, No. 41, § 17, cannot be questioned after acceptance of award — Drouin v. Boston & M. R. Co. Vt , 52 Atl. Rep. 957.

80. EQUITY— Order in Chambers. — Grant of order of reference at chambers for purposes of accounting, where no questions of law are involved, held proper.— Green v. McCarter, S. Car., 42 S. E. Rep. 157.

81. ESTOPPEL—Claimant of Property.—In trial of right of property under Code, § 4141, held, that the affidavit and claim bond of a claimant estops him to deny a proper levy.—Eldridge v. Grice, Ala., 32 So. Rep. 683.

82. ESTOPPEL — Trespass. — Defendant in trespass, claiming right to cut timber under a void contract from one who afterwards deeded the land to plaintiff, is estopped to deny plaintiff's title. — Monds v. Elizabeth City Lumber Co., N. Car., 42 S. E. Rep. 334.

83. EVIDENCE—Disbarment Proceedings.—When consent order is introduced in disbarment proceedings, the attorney can show the motive and intent with which he entered into the agreement for the order. — *In re* Duncan, S. Car., 42 S. E. Rep. 433.

84. EVIDENCE—Judicial Notice .— Judicial notice taken of the historical development of savings banks organized under special charters, and hence that such banks were successors of state banks of circulation, discount, and deposit, and not of the savings banks existing prior to national banking act.—State v. Franklin County Sav. Bank & Trust Co., Vt., 52 Atl. Rep. 1069.

85. EVIDENCE—Negligence.—Part of a car wheel, found some time after derailment, held admissible in connection with testimony as to pieces seen just after the accident.—Roberts v. Port Blakely Mill Co., Wash , 70 Pac. Rep. 111.

86. EVIDENCE—Opinion.—A witness cannot testify that in his opinion the breach of a given contract by one of the parties thereto caused damages to the other in a in a lump sum stated. — Foote & Davies Co. v. Malony, Ga., 42 S. E. Rep. 413.

87. EVIDENCE—Written Instrument.—Terms of written instrument held not subject to variation by parol merely because made between partners.—Arnold v. Arnold, Cal., 70 Pac. Rep. 23.

88. EXCHANGES— Property Right in Quotations.— The Chicago Board of Trade has at least a qualified property right in the quotations made on its exchange, which entitles it to protection against their use by another who refuses to comply with reasonable and proper regulations established by it as a condition to the right to receive and use such quotations. — Board of Trade of City of Chicago v. Christie Grain & Stock Co., U. S. C. C., W. D. Mo., 116 Fed. Rep. 944.

89. EXECUTION — Money in Lieu of Bail. — Where one furnishes money to be deposited by one accused in lieu of bail, subsequent to an order discharging bail, the fund is not subject to execution against the accused. — People v. Gould, 77 N. Y. Supp. 1067.

90. EXECUTION—Satisfaction of Judgment. — The presumption that proceeds of an execution levy go to the satisfaction of the judgment is rebuttable by proof that the judgment creditor was deprived of the fruits thereof by operation of law or act of the judgment debtor.— Adams v. National Bank of Commerce, Wash., 70 Pac. Rep. 105.

91. EXECUTORS AND ADMINISTRATORS —Claim not Presented.—Claim not presented to an administrator cannot be employed in set-off against him, suing in his representative capacity. — Hall v. Greene, R. I., 52 Atl. Rep. 1087.

92 EXECUTORS AND ADMINISTRATORS—Liability of Estate.—A personal representative cannot by giving a note, create a cause of action against the estate. — Whitten v Bank of Fincastle, Va., 42 S. E. Rep. 309.

93. EXECUTORS AND ADMINISTRATORS—Nunc Pro Tunc Order. — An administrator, paying doctor's bills and funeral expenses of an adult child of intestate, cannot have an allowance therefor out of the estate, but only a charge on the distributive share of the child.—*In re* Murphy's Estate, Wash., 70 Pac. Rep. 109.

94. EXECUTORS AND ADMINISTRATORS — Sale of Realty. —Resident executors, selling land of testator in foreign state in accordance with terms of will, must account for proceeds to resident creditors. — *In re* Newell's Estate, 77 N. Y. Supp. 1116.

95. EXECUTORS AND ADMINISTRATORS — Trust Funds.— Funds which have been trust funds in the hands of an intestate cannot be held liable for his debts, but the property remains that of a *cestui que* trust. — *In re* Belt's Estate, Wash., 70 Pac. Rep. 74.

96. EXECUTORS AND ADMINISTRATORS—Year's Support for Widow and Children. — A petition which alleged that a year's support was void, because of fraud practiced on the ordinary and another, is not sustained when the evidence in support thereof fails to show any fraud. — Wright v. Roberts, Ga., 42 S. E. Rep. 869.

97. FIXTURES — Realty.—Where a tenant, as required by his lease, took out the old plumbing and replaced it with new, held, that the new plumbing became a part of the realty. —Camp v. Charles Thacher Co., Conn., 52 Atl. Rep. 953.

98. FORCIBLE ENTRY AND DETAINER—Separate Trials.— In an action of forcible entry and detainer, the question of granting separate trials to the several defendants is within the discretion of the trial judge. — Levy v. David, R. I., 52 Atl. Rep. 1080.

99. FORGERY — Trial Court's Discretion.—A sentence in a forgery case, based upon a verdict of guilty with recommendation for mercy, held not such an abuse of the court's discretion as would justify a review thereof.— State v. Newton, Wash., 70 Pac. Rep. 81.

100. FRAUDS, STATUTE OF — Consideration. — Contracts within statute of frauds, Code, § 2152, are not relieved therefrom by section 1600, creating a *prima facie* presumption that a contract sued on is supported by a consideration.—Speer v. Crowder, Ala., 32 So. Rep. 658.

101. FRAUDS, STATUTE OF—Oral Lease. — An action will not lie for damages for breach of oral lease for a year in the future; the agreement being void under the statute of frauds.—Cram v. Thompson, Minn., 91 N. W. Rep. 483.

102. FRAUDULENT CONVEYANCES — Consideration. — Household services, etc., performed by a wife without promise of compensation, held not an adequate consideration for a conveyance to her from her husband, as against his creditors. — Farmers' Nat. Bank v. Thomson, Vt., 52 Atl. Rep. 961.

103. GAMING — Stock Transactions. — In determining whether transactions in stocks were gaming transactions, that the transaction between the broker and those of whom he bought or to whom he sold were real is not decisive.—Sharp v. Stalker, N. J., 52 Atl. Rep. 1120.

104. GARNISHMENT — Mistaken Disclosure.—Garnishee, after making a mistaken disclosure that he was indebted to the judgment debtor, may amend, and show his indebtedness was to another.—Gerow v. Hyde, Mich., 91 N. W. Rep. 615.

105. GAS — Inspecting Pipes. — Owner of dwelling held not entitled to recover of gas company for injuries from presence of gas in defective pipes in house. — Smith v. Pawtucket Gas Co., R. I., 52 Atl. Rep. 1078.

106. GRAND JURY—Collateral Attack.—Where the grand jury returned into the court general presentments embodied therein without objection, they cannot thereafter be attacked on the ground that some of the regular grand jurors were absent and tales grand jurors participated in the vote taken.—Kerby v. Long, Ga., 42 S. E. Rep. 886.

107. HOMICIDE — General Malice. — Threats just before the killing held admissible to show general malice.— State v. Vance, Wash., 70 Pac. Rep. 34.

108. HOMICIDE — Self-Defense. — Where the defense is self-defense, it is proper to charge that, if the defendant fought to gratify his passion, he could not be acquitted on the plea of self-defense.—Sanders v. State, Ala., 32 So. Rep. 634.

109. HUSBAND AND WIFE — Action for Assault.—Under St. 1898, ch. 40, § 15, a married woman, living with her husband, may recover damages in her own name and right for an assault upon her by a third person.—Long v. McWilliams, Okla., 69 Pac. Rep. 882.

110. HUSBAND AND WIFE — Physician's Fee.—The separate estate of a married woman is liable for the fees of a physician whom she called in. — Glenn v. Gerald, S. Car., 42 S. E. Rep. 155.

111. HUSBAND AND WIFE—Wife as Surety.—A married woman incurred no personal liability by signing her husband's note as surety.—Magoffin v. Boyle Nat. Bank, Ky., 69 S. W. Rep. 702.

112. INFANTS—Ratification.—Infant grantee in a deed, having knowledge thereof and acquiescing therein for three or four years after majority, held to have accepted it, especially after the rights of creditors had intervened. Locknane v. Hoskins, Ky., 69 S. W. Rep. 719.

113. INJUNCTION—Attorney's Fees.—Attorney's fees for resisting an effort to have a decree dissolving an injunction set aside are recoverable on the injunction bond.—Jesse French Piano & Organ Co. v. Forbes, Ala. 32 So. Rep. 678.

114. INSANITY—Irresistible Impulse.—That phase of insanity known as "irresistible impulse doctrine" is not recognized in Florida.—Davis v. State, Fla., 32 So. Rep. 822.

115. INSOLVENCY—Compromise of Claim.—A referee in insolvency has no jurisdiction of a question as to whether the court's action in granting leave to his assignees to compromise a claim was proper.—Sowles v. Lewis, Vt., 52 Atl. Rep. 1073.

116. INSURANCE—Vested Interest. — The named beneficiary in a benefit certificate, allowing substitution of beneficaries, has no vested interest therein.—Supreme Council of Royal Arcanum v. Kacer, Mo., 69 S. W. Rep. 671.

117. INTOXICATING LIQUORS—Citizens.—The term "Citizens," as used in a town charter, providing that the town authorities should have power to license a sale of liquor, but should not grant any application unless accompanied by "a petition signed by two-thirds of the citizens," embraces only the qualified voters of the town.—Wray v. Harrison, Ga., 42 S. E. Rep. 351.

118. JUDGES—Disqualification of Judge. — Member of town council, who had appropriated money for expense of prosecution of violations of a law, held not disqualified as judge to try such a case.—State v. Collins, R. I., 52 Atl. Rep. 990.

119. JUDGMENT—Garnishment.—The giving of a bond to dissolve a garnishment issued on an attachment does not convert the proceeding into a suit authorizing a personal judgment against the defendant.—Beasley v. Lennox-Haldeman Co., Ga., 42 S. E. Rep. 385.

120. JUDGMENT—Res Judicata.—The vendors of plaintiff having litigated with defendants the validity of a judgment enforcing a lien on the property in controversy, plaintiff is bound by that decision.—Day & Congleton Lumber Co. v. Mack, Ky., 69 S. W. Rep., 712.

121. JUDGMENT—Res Judicata.—A judgment of a court of Italy which had jurisdiction, rendered after proceedings in due course and not shown to be affected by fraud or prejudice, is conclusive between the parties, when sued on in a court of the United States.—Gloe v. Westervelt, U. S. C. C., S. D. N. Y., 116 Fed. Rep. 1017.

122. JURY—Forming Jury List.—Bill of Rights, § 10, securing right of trial by an impartial jury of the county, held not violated by Rev. St. 1899, § 3346, authorizing jury list of those whom the jury commissioners "believe" to be qualified, or by section 3358, authorizing jury panel for term, when exhausted, to be completed from those on jury list living within five miles of the courthouse.—State v. Bolin, Wyo., 70 Pac. Rep. 1.

123. JURY—Objection to Juror.—When the accused is given a list of the petit jurors, and it appears that one of the jurors served on the grand jury which returned the indictment, a failure to object is a waiver of his disqualification.—Sapp v. State, Ga., 42 S. E. Rep. 410.

124. LANDLORD AND TENANT — Adverse Possession.—When relation of landlord and tenant exists, it continues as to all succeeding to possession under the tenant.—Neff v. Ryman, Va., 42 S. E. Rep. 314.

125. LOGS AND LOGGING—Counterclaim.—In a suit for a settlement of accounts, an injury to logs, contracted to be sold to defendant, from exposure, by reason of delay in delivery, was properly pleadable as a counterclaim.—Yellow Poplar Lumber Co. v. Stephens, Ky., 69 S. W. Rep. 715.

126. MANDAMUS—Release of Surety.—*Mandamus* is the appropriate remedy to compel the court to release surety on an official bond, as authorized by statute.—United States Fidelity & Guaranty Co. v. Peebles, Va., 42 S. E. Rep. 310.

127. MASTER AND SERVANT—Injury to Servant.—An employer, who has agreed to furnish his employee a harness sufficiently strong to enable him to control a certain horse, is not thereby made an insurer of the quality of harness furnished. — Robert Portner Brewing Co. v. Cooper, Ga., 42 S. E. Rep. 408.

128. MINES AND MINERALS—Location.—Work on a mining claim done by one after making a valid location and a subsequent invalid one will be attributed to the valid location. — Temescal Oil Mining & Development Co. v. Salcido, Cal., 69 Pac. Rep. 1010.

129. MORTGAGES — Insolvency.—Where the assignee in insolvency sues to recover the value of property on the theory that the mortgage was an unlawful preference, such action is an election whereby the assignee affirms the mortgage as a noted incumbrance.—Sowles v. Lewis, Vt., 52 Atl. Rep. 1073.

130. MORTGAGES — Merger—To prevent merger, a redemption certificate may be held to show a purchase rather than payment, of a decree.—Gleason v. Carpenter Vt., 52 Atl. Rep. 961.

131. MORTGAGES—Releasing a Portion.—Where senior mortgagee releases part of the mortgage lien to effect the sale of property, held entitled to be credited with any benefit resulting therefrom to junior mortgagees.—Flanagan v. Shaw, 77 N. Y. Supp. 1070.

132. MUNICIPAL CORPORATIONS — Bicycle Path—A city which constructs a bicycle path held bound to maintain it in a reasonably safe condition. — Prather v. City of Spokane, Wash., 70 Pac. Rep. 55.

133. MUNICIPAL CORPORATIONS — Failure to Prohibit Nuisance.—A city is not liable for injury to property resulting from its failure to enact and execute ordinances for the prevention of a nuisance.—Arnold v. City of Stanford, Ky., 69 S. W. Rep. 726.

134. MUNICIPAL CORPORATIONS — Purchase of Land — When a city council appoints a committee to purchase land for city buildings, etc., they will not be restrained on the theory that the authority of the council cannot be delegated.—Parker v. City of Concord, N. H., 52 Atl. Rep. 1095.

135. MUNICIPAL CORPORATIONS — Validity of Ordinance.—An ordinance expressly authorized by statute cannot be declared void upon the ground that it is an unreasonable and oppressive exercise of the police power. —Chesapeake & O. Ry. Co. v. City of Maysville, Ky., 69 S. W. Rep. 728.

136. NEGLIGENCE — Child Under Five.—A child under five years of age may not be charged with contributory negligence. — Eskildsen v. City of Seattle, Wash., 70 Pac. Rep. 64.

137. NUISANCES — Use of Terminal Yard.—Injuries and inconveniences to persons residing near a railroad terminal yard lawfully constructed, caused by noise, smoke and the like, which result from the ordinary use of such a yard, are not nuisances. — Georgia R. & Banking Co. v Maddox, Ga., 42 S. E. Rep. 315.

138. PARENT AND CHILD—Releasing Claims for Injury.—A contract whereby a father hires his minor son to another, and releases the latter from all liability "for damages for any injuries," held to defeat a recovery by the father for the loss of the son's services during minority, even where occasioned by the death of the son.—New v. Southern Ry. Co., Ga., 42 S. E. Rep. 391.

139. PARTNERSHIP—Compensation. — Where a partner continues the firm business under the will, he cannot, as executor, obtain any compensation beyond his commissions.—*In re* Dummett, 77 N. Y. Supp. 1118.

140. PARTNERSHIP — Dissolution.—Where the surviving partners delegate to one of their number the right to wind up the affairs of the partnership, the managing partner cannot, without further authority, bind one of the others by the contract, which is of such a nature that the partnership assets are not bound.—Bass Dry Goods Co. v. Granite City Mfg. Co., Ga., 42 S. E. Rep. 415.

141. PARTNERSHIP—Failure to Keep Proper Accounts.—Where partners have been equally culpable in failing to keep proper books, and have postponed a settlement until one of them has died or necessary records have been lost, a court of equity will not attempt to settle the partnership accounts. — Garnett v. Wills, Ky., 69 S. W. Rep. 695.

142. PLEADING—Amendment.—A circuit judge at a subsequent term may vacate an order requiring a party to amend his pleading by adding a party defendant.—Peoples v. Mims, S. Car., 42 S. E. Rep. 155.

143. PLEADING — Bill of Particulars.—A bill of particulars that was in the nature of a complaint should have been objected to by motion for a more perfect one.—Dudley v. Duval, Wash., 70 Pac. Rep. 68.

144. PLEADING — Demurrer.—Sustaining of one ground of demurrer to a complaint, though others are overruled, warrants final judgment against plaintiff, he not amending.—Terry v. Allen, Ala., 32 So. Rep. 664.

145. PROCESS—Return of Service.— A return of service of summons by a disinterested person authorized by law to make it is *prima facie* evidence of the material facts recited therein. — Northwestere & Pacific Hypotheek Bank v. Ridpath, Wash., 70 Pac. Rep. 139.

146. PROCESS—Usual Abode.—In the case of a married man, the house of his usual abode, for the purpose of service of summons, is the house wherein his wife and family reside.— Northwestern & Pacific Hypotheek Bank v. Ridpath, Wash., 70 Pac. Rep. 139.

47. PUBLIC LANDS — Abutting on Water Courses. — Grants by the United States of lands abutting on lakes, rivers, or other waters are to be construed, with reference to the quantity conveyed, in accordance with the laws of the state in which the land is situated.— *In re* Valley, U. S. D. C., 116 Fed. Rep. 983.

148. PUBLIC LANDS — Cancellation of Patent. — The United States may maintain a suit for cancellation of a patent for lands issued under a railroad grant, where an individual had acquired a prior right thereto under the homestead law; but in such suit the equities existing as between the real parties in interest may be taken into consideration.—United States v. Chicago, M. & St. P. Ry. Co., U. S. C. C. of App., Eighth Circuit, 116 Fed. Rep. 969

149. PUBLIC LANDS— Failure to Describe Exclusions.—A patent for public lands is not void by reason of the fact that prior grants excluded therefrom are not specifically described therein. — Helton v. Central Trust & Safety Deposit Co., Ky., 69 S. W. Rep. 720.

150. RAILROADS—Injury to Tresspasser.—Railroad company held not to owe trespasser on train the duty of signaling before starting it. — Carter v. Charleston & W. C. Ry. Co., S. Car., 42 S. E. Rep. 161.

151. RAILROADS— Mutual Traffic Contract. — A mutual traffic contract, by which a railroad was granted trackage right over the rights of way of another railroad and a joint use of its depot, held valid. — Georgia R. & Banking Co. v. Maddox, Ga., 42 S. E. Rep. 515.

152. RECEIVERS— Adoption of Lease. — The mere fact that a receiver takes possession of leasehold premises does not amount to an adoption of the lease, until he has had a reasonable time for election. — Dayton Hydraulic Co. v. Felsenthall, U. S. C. C. of App., Sixth Circuit, 116 Fed. Rep. 961.

153. RECEIVERS — Reduction of Compensation — The court may reduce amount of compensation allowed a receiver on *ex parte* order. — *In re* Angell, Mich., 91 N. W. Rep. 611.

154. RECEIVERS—Suit Against Stockholder.—A receiver apointed by a court under its general equity powers to collect and bring into court the money for which the stockholders of an insolvent corporation have been adjudged liable under the statute is merely an agent of the court, without any extraterritorial powers, and is not vested with any title to the cause of action against a stockholder which will support an action thereon in a foreign jurisdiction.—Hilliker v. Hale, U. S. C. C. of App., Second Circuit, 117 Fed. Rep. 229.

155. RECORDS—"Filed."—A paper is filed by lodging it with the clerk of the court, and the clerk's indorsement is not essential where the clerk and the court have treated the paper as filed.—Day & Congleton Lumber Co. v. Mack, Ky., 69 S. W. Rep. 712.

156. REFERENCE—Revocation. — After order of reference is revoked, judge held to have power to enter second order of reference. — Green v. McCarter, S. Car., 42 S. E. Rep. 157.

157. RELEASE. — Personal Injury. — In the absence of fraud or mistake, a release of an unliquidated claim as conclusively estops the parties from reviving it as a final judgment.—Chicago & N. W. Ry. Co. v. Wilcox, U. S. C. C. of App., Eighth Circuit, 116 Fed. Rep. 918.

158. REMOVAL OF CAUSES — Diverse Citizenship. — Diverse citizenship, authorizing removal of cause from state to federal court, must exist at time suit is begun, as well as at time of removal, and must be made to appear. —German Savings & Loan Soc. v. Domitzer, U. S. C. C. of App., Ninth Circuit, 116 Fed. Rep. 471.

159. REMOVAL OF CAUSES—Ex Parte Order.—Though an order for removal of cause to federal court for prejudice or local influence is made *ex parte*, plaintiff may afterwards be heard as to the grounds of removal. — Montgomery County v. Cochran, U. S. C. C., M. D. Ala., 116 Fed. Rep. 985.

160. REMOVAL OF CAUSES—Removal of Cause After Removal.—A docket fee of $10 may properly be allowed to plaintiff's attorney, where a cause is remanded to a state court, as a case in which judgment is rendered without a jury, within the meaning of Rev. St. § 824.—Riser v. Southern Ry. Co., U. S. C. C., D. So. Car., 116 Fed. Rep. 1014.

161. REMOVAL OF CAUSES — Under Laws of U. S — Where removal of a cause is sought on the ground that the controversy is one arising under the constitution of laws of the United States, all the defendants must join in the application for removal. — Miller v. LeMars Nat. Bank, U. S. C C., N. D. Iowa, 116 Fed. Rep. 551.

162. REPLEVIN — Bond of Defendant.—Defendant's undertaking on reclaiming chattel covers plaintiff's costs.—John Church Co. v. Dorsey, 77 N. Y. Supp. 1065.

163. REPLEVIN — Damages. — In an action to recover possession of personal property, plaintiff may elect to take a verdict for damages alone, when a demand for possession was made before the suit and defendant refuses to deliver the same. — Hodges v. Cummings, Ga., 42 S. E. Rep. 394.

164. REPLEVIN — When Lies.—Replevin will not lie, defendants not being shown to have had possession or control of the property when suit was commenced. — Hall v. City of Kalamazoo, Mich., 91 N. W. Rep. 615.

165. RES JUDICATA —Decision of Supreme Court. — A decision of the supreme court rendered on one state of facts is not *res judicata* on another trial of the same cause, when a new issue has been introduced and the evidence is substantially different.—Bass Dry Goods Co. v. Granite City Mfg. Co., Ga., 42 S. E. Rep. 415.

166. SALES — Breach of Warranty.—Where plaintiff received a wagon, under a contract to pay $15 per month for the use thereof until $150 was paid, he acquired no title to the wagon, and, until such sale on full payment, could have no action for breach of warranty.— Stearns v. Drake, R. I., 52 Atl. Rep. 1062.

167. SALES—Damages.—Where, under a contract to deliver 1,000 gallons of oysters per day, plaintiffs delivered only from 10 to 300 gallons per day for over two months, they were not entitled to damages for defendant's refusal to continue to receive such shipments. — La Vallette v Booth, N. Car., 42 S. E. Rep. 446.

168. SALES — Delay in Delivery. — In an action by the buyer for failure to deliver goods under contract, an instruction that, if the delay in delivery was caused by the scarcity of cars, defendant was not liable, held properly refused.—Emack v. Hughes, Vt., 52 Atl. Rep. 1061.

169. SALES —Measure of Damages. — The measure of damages for breach of a contract to buy the output of a coal mine is, in the absence of proof that the coal has no market value, the difference between the market value and the contract price. — Kincaid v. Price, Colo., 70 Pac. Rep. 153.

170. STATES — Vacancy in Office. — There is no vacancy, to be filled by election, in the offices of governor or lieutenant-governor on the death of the governor and the performance of his duties by the lieutenant-governor.— State v. McBride, Wash., 70 Pac. Rep. 25.

171. STREET RAILROADS — Ordinary Care. — Employees of street car company are not required to stop a car until it becomes evident to a person of ordinary prudence that a pedestrian has failed in his duty to take due care and has placed himself in a perilous situation. — Consumers' Electric Light & St. R. Co. v. Pryor, Fla., 32 So. Rep. 797.

172. STREET RAILWAYS — Transfers. — A street railway company which issued to a passenger a transfer to a line other than the one requested held liable in substantial damages for its breach of contract in ejecting him from the line to which he supposed he had received a transfer. —Lawshe v. Tacoma Ry. & Power Co., Wash., 70 Pac. Rep. 118.

173. TAXATION — Assessment. — An assessment to "unknown owner, and to all owners and claimants, known and unknown," held void. — Lewis v. Blackburn, Oreg., 69 Pac. Rep. 1024.

174. TAXATION — Good Will of a Business. — The good will that attaches to the business of conducting a newspaper belonging to a copartnership is not in and of itself property, within the constitutional provision requiring all property to be taxed. — Hart v. Smith, Ind , 64 N. E. Rep. 661.

175. TAXATION — Inheritance Tax. — Collateral inheritance tax on defeasible remainders held properly levied at the full value of the remainders, without deduction for a former life estate.—*In re* Connoly's Estate, 77 N. Y. Supp. 1113.

176. TAXATION—Land Sold for Taxes.—The proper remedy for the redemption by a mortgagee of land sold for taxes assessed against it and the owner's personalty held to be a proceeding in equity against the tax certificate holder.—Statton v. People, Colo., 70 Pac. Rep. 157.

177. TENANCY IN COMMON—Contribution.—Right of cotenant, paying more than his share of price, to contribution, held not to accrue until partition.—Grove v. Grove, Va., 42 S. E. Rep. 312.

178. TENDER—Offer of Performance —Under Civ. Code, 1496, held, that where, on a tender by a vendee of realty to the vendor, the latter did not accept the offer, the vendee was not in fault in not producing the money or permitting it to be counted.—Latimer v. Capay Val. Land Co., Cal., 70 Pac. Rep. 82.

179. TRESPASS—Statutory Penalty.—In an action to recover the statutory penalty imposed by Code, § 4137, evidence as to a previous controversy between the parties as to cutting of trees on other land held properly excluded.—Jernigan v. Clark, Ala , 32 So. Rep. 686.

180. TRIAL—Right to Address Jury.—A party to a suit has a right to prosecute or defend in person; but where the answer made by such a party sets up no defense, and under his own evidence the verdict should go against him, he has no right to right to appear and address the jury to whom the case has been submitted.—Gunn v. Head, Ga., 42 S. E. Rep. 343.

181. UNITED STATES—Eight-Hour Labor Law. — The eight-hour labor law of August 1, 1892, is not applicable to work contracted for by the United States to be performed in Alaska.—Moses v. United States, U. S. D. C. D. Wash., 116 Fed. Rep. 526.

182. USURY—Chattel Mortgage —Where usurious notes is discharged by a new note at a lawful rate, which is received in payment of the old one, introducing a new party as maker, the usury of the first note is no bar to the enforcement of a chattel mortgage executed to secure such note.—Coleman v. Cole, Mo., 69 S. W. Rep. 692.

183. USURY—Mortgage.—Conveyance of land to agent of mortgagee without her knowledge, for services in obtaining loan, held not usurious —Flanagan v. Shaw, 77 N. Y. Supp. 1070.

184. VENDOR AND PURCHASER—Refusal to Perform.— Where, on a tender and offer of performance by a vendee of realty in a contract calling for a fee simple title, the vendor tenders a deed not sufficient to convey a fee simple, it is a refusal of the offer.—Latimer v. Capay Val. Land Co., Cal., 70 Pac. Rep. 82.

185. VENDOR AND PURCHASER—Unrecorded Deed.—An unrecorded deed is not valid against a subsequent purchaser from the grantor having no notice thereof.— Goosby v. Johnson, Ky., 69 S W. Rep. 697.

186. WATERS AND WATER COURSES—Diverting Flow.— An owner of land on which water has collected in a natural depression may not, by the construction of ditches, divert the water to other parts of his own land, so as to throw it on the adjoining lands of another. — Noyes v. Cosselman, Wash., 70 Pac. Rep. 61.

187. WATERS AND WATER COURSES—Injunction.—An injunction held issuable against a water company to restrain it from cutting off plaintiff's water supply.— Edwards v. Milledgeville Water Co., Ga., 42 S. E. Rep. 417.

188. WILLS—Construction.—Where there are devesting clauses in a will, especially of a remainder, they are to operate so as to vest the estate indefeasibly at the earliest period of time.—Sumpter v. Carter, Ga., 42 S. E. Rep. 324.

189. WILLS — Legatee as Debtor. — A bill alleging that an executor had in his hands a sum of money belonging to plaintiff's debtor as a legatee, and seeking to subject the fund to the debt, held not demurrable. — Gorman v. Stillman, R. I., 52 Atl. Rep. 1088.

190. WILLS—Nuncupative.—Under the statute of Washington a decree admitting to probate an alleged nuncupative will is without jurisdiction and void, where citation to the widow and next of kin was not issued until the day the decree was entered, and after the hour named therein for hearing, and was immediately returned without service. — O'Callaghan v. O'Brien, U. S. C. C., D. Wash., 116 Fed. Rep. 934.

191. WILLS—Revocation.—Entry on a corner of the last sheet upon which a will was written held insufficient as a revocation.—Oetjen v. Oetjen, Ga., 42 S. E. Rep. 887.

192. WITNESSES — Leading Question.— Where, on a criminal prosecution, a witness appeared to the trial court to be unwilling, held within such court's discretion to allow the solicitor for the state to lead him.—Mann v. State, Ala., 69 Pac. Rep. 704.

193. WITNESSES — Partnership Accounts.—In an action for a settlement of partnership accounts, the testimony of a surviving partner is to transactions with his deceased partner is incompetent.—Garnett v. Wills, Ky., 69 S. W. Rep. 695.

194. WITNESSES—Testimony Made Competent by Other Party.— Plaintiff having first testified to what passed between defendant and deceased, defendant may give his version of the same transaction.—Wolfe v. Hampton, N. Car., 42 S. E. Rep. 332.